Supreme Court, U.S.
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No. 95-___

In The
Supreme Court of the United States
October Term, 1995

MARY GLOVER, et al.,

Petitioners,

v.

KENNETH McGINNIS, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where prison policies and procedures constitute a barrier to prisoners' meaningful access to the courts, is the state required to provide affirmative legal assistance necessary to surmount such barriers?

II. Are prisoners entitled to affirmative legal assistance to protect their fundamental parental rights where absent such assistance Plaintiffs' parental rights are at risk?

III. Where prisoners upon incarceration are required to provide and maintain adequate care for their children in order to retain their parental rights, must the state provide affirmative legal assistance to protect those rights?

IV. Did the Court of Appeals err in finding that the district court abused its discretion in holding Defendants in contempt for termination of legal assistance in the area of parental rights where Defendants were aware of the substance and intent of the court's orders?

PARTIES TO THE PROCEEDING

Petitioners, Mary Glover, Lynda Gates, Jimmie Ann Brown, Manette Gant, Jacalyn M. Settles, and several Jane Does, are persons who are or were confined in Michigan prisons and are representatives of the class of all women prisoners confined under the jurisdiction of the Michigan Department of Corrections (MDOC).

Respondent Kenneth McGinnis is Director of the MDOC; respondent Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau of Prison Industries; Robert Steinman is Director of the MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility; Terri Huffman is Supervisor of Camp Branch.[1]

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[1] These respondents are the successors in office of Perry Johnson, William Kime, Robert Brown, Jr., Frank Beetham, and Richard Nelson, respectively, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. Gloria Richardson, Dorothy Costen, and Clyde Graven, all listed as Defendants in the original action, are no longer Defendants due to the closure of certain facilities as women's prisons. Joan Yukins, Sally Langley, and Terri Huffman were added as Defendants due to the opening of three new facilities for women prisoners. Florence R. Crane, G. Robert Cotton, Thomas K. Eardley, Jr., B. James George, Jr., Duane L. Waters, and the Michigan Corrections Commission are no longer Defendants due to the dissolution of that Commission.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED . . . . . App. 35

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 8

I. A STATE MAY NOT ERECT BARRIERS IN THE WAY OF INMATES' ACCESS TO THE COURTS 9

II. PRISONERS ARE ENTITLED TO AFFIRMATIVE LEGAL ASSISTANCE TO PROTECT THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING PARENTAL AND CUSTODIAL RIGHTS 14

III. WHERE THE FACT OF INCARCERATION ITSELF MAY LEAD TO THE LOSS OF A FUNDAMENTAL CONSTITUTIONAL RIGHT, THE

STATE IS OBLIGATED TO OFFER AFFIRMATIVE ASSISTANCE TO PRISONERS TO PROTECT THAT RIGHT 23

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Boddie v. Connecticut, 401 U.S. 371 (1971) 10, 18

Bounds v. Smith, 430 U.S. 817 (1977) 9, 14, 16, 22, 25

Canterino v. Wilson, 644 F. Supp. 738 (W.D. Ky. 1986), aff'd, 875 F.2d 862 (6th Cir. 1989) 14

Chambers v. Baltimore and Ohio Railroad Co., 207 U.S. 142 (1907) 10

Cofield v. Ala. Public Service, 936 F.2d 512 (11th Cir. 1991) 25

Corpus v. Estelle, 551 F.2d 68 (5th Cir. 1977) . . 11, 18

Cruz v. Beto, 405 U.S. 319 (1971) 10

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 22, 26

Eldridge v. Block, 832 F.2d 1132 (9th Cir. 1987) . . 18

Estelle v. Gamble, 429 U.S. 97 (1976) 22

Farmer v. Brennan, 114 S.Ct. 1970 (1994) 22

Gilmore v. Lynch, 319 F. Supp. 105 (1970), aff'd sub nom Younger v. Gilmore, 404 U.S. 15 (1971) 11

Glover, 75 F.2d at 269 . . . . . 19, 20

Glover, 934 F.2d 703 (6th Cir. 1991) 13

Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979) 3

Glover v. Johnson, 510 F. supp. 1019 (E.D. Mich. 1981), aff'd sub nom, Cornish v. Johnson, 774 F.2d 1161 (6th Cir. 1985) 2, 3

Glover v. Johnson, 721 F. supp. 808 (E.D. Mich. 1989) 2, 3, 13, 14

Glover v. Johnson, 75 F.3d 264 (6th Cir. 1996), reh'g denied 1, 7, 8, 15, 19

Glover v. Johnson, 850 F. Supp. 592 (E.D. Mich. 1994) . . . . . passim

Glover v. Johnson, 855 F.2d 277 (6th Cir. 1988) . . 3, 14

Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977) . . 2

Gluth v. Kangas, 951 F.2d 1504 (9th Cir. 1991) 9

In re Green, 669 F.2d 779 (D.C. Cir. 1981) 18, 25

Griffen v. Michigan Department of Corrections, 5 F.3d 186 (6th Cir. 1993) 29

Harris v. Philadelphia, 47 F.3d 1342 (3rd Cir. 1995) 29

Howat v. Kansas, 258 U.S. 181 (1922) 30

Ex parte Hull, 312 U.S. 546 (1941) 9, 10, 16

Jackson v. Procunier, 789 F.2d 307 (5th Cir. 1986) . 11

John L, et al v. Adams, 964 F.2d 228 (6th Cir. 1992)9, 11 14, 23, 25

Johnson-El v. Schoemehl, 878 F.2d 1043 (3rd Cir. 1989) 13

Johnson v. Avery, 393 U.S. 483 (1969) . . . 9, 16, 21, 25

Knop v. Johnson, 977 F.2d 966 (6th Cir. 1992) 4

Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992) 11, 14, 29

Kovacs v. Cooper, 336 U.S. 77 (1949) 17

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 17, 19

Little Earth of United Tribes, Inc. v. Department of Housing and Urban Development, 807 F.2d 1433 (8th Cir. 1986) 29

Mathews v. Eldridge, 424 U.S. 319 (1976) 19

McCarthy v. Madigan, 503 U.S. 140 (1992) 10

Meyer v. Nebraska, 262 U.S. 390 (1923) 17

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 17

Murray v. Giarratano, 492 U.S. 1 (1989) 17, 25

N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585 (6th Cir. 1987) 28

Procunier v. Martinez, 416 U.S. 396 (1974) . . 9, 13, 16

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 17

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) 9, 11, 14

Santosky v. Kramer, 455 U.S. 745 (1982) 17, 18

Schrier v. Halford, 60 F.3d 1309 (8th Cir. 1995) . . . 11

Smith v. Bounds, 657 F. Supp. 1327 (E.D. N.C. 1986), aff'd, 813 F.2d 1299 (4th Cir. 1987), aff'd en banc, 841 F.2d 77 (1988) 18

Stanley v. Illinois, 405 U.S. 645 (1972) 17

Straub v. Monge, 815 F.2d 1467 (11th Cir.), cert. denied, 484 U.S. 946 (1987) 11, 13, 18

Union Pacific Railroad Co. v. Mason City fort Dodge Railroad Co., 232 U.S. 237 (1911) 29

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 30

Wisconsin v. Yoder, 406 U.S. 205 (1972) 17

Wolff v. McDonnell, 418 U.S. 539 (1973) 16, 23, 25, 26

FEDERAL STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1983 2

42 U.S.C. §1983 2

H.R. 3019, § 504(a)(15)(April 26, 1996) 21

STATE CASES

In Re Clausen, 442 Mich. 648 (1993) 18

STATE STATUTES

MCL 712A.17c(4)-(6); MSA 27.3178(598.17c)(4)-(6); MCR 5.915(B) 18, 20, 24

MCL 712A.17c(4)-(6), MSA 27.3178(598.17c)(4)-(6) 21

OTHER AUTHORITIES

MCR 6, 18, 21

American Bar Assn, Standards for Criminal Justice, Standard 23.2.1(b)(i)(1986) 11

American Correctional Assn, Standards for Adult Correctional Institutions, Standard 3-4262 11

SUPREME COURT RULES

Sup. Ct. R. 35.3 2

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 75 F.3d 264 (1996) and is reprinted as App. 1 to this Petition. The Sixth Circuit's order denying Plaintiffs' motion for rehearing and suggestion for rehearing en banc is reprinted as App. 34. The opinion of the United States District Court for the Eastern District of Michigan, reported at 850 F.Supp. 592 (1994), is reprinted as App. 11.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on February 14, 1996. Plaintiffs' request for rehearing and suggestion for rehearing en banc were denied on March 27, 1996. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory provisions applicable to this case are set out in App. 35.

STATEMENT OF THE CASE

The extensive procedural history of this 19-year class action litigation involving equal protection violations for

women prisoners is set forth in detail in *Glover v. Johnson*, 721 F. Supp. 808, 810-813 (E.D. Mich. 1989), and is not repeated here except as it relates to the instant appeal.

In 1977, Petitioners (hereinafter "Plaintiffs"), a class of all present and future women under the jurisdiction of the Michigan Department of Corrections (MDOC), filed an action seeking a declaratory judgment for violations of their equal protection rights and their right to access to the courts.[1] After a bench trial, the district court ruled that the Respondents (hereinafter "Defendants") had violated the Equal Protection Clause of the Fourteenth Amendment and failed to provide adequate access to the courts to the Plaintiff class. Part of the remedy for Defendants' denial of Plaintiffs' access to the courts and equal protection violations required Defendants to: (1) provide paralegal education "to train female inmates to help themselves and each other in the presentation of their claims to the courts" and (2) provide on-site legal assistance through Prison Legal Services of Michigan (PLS).[2] *Glover v. Johnson*, 478 F. Supp. 1075, 1096-1097 (E.D. Mich. 1979) (hereinafter "*Glover I*").

Subsequently, the parties entered negotiations that led to a "final order." *Glover v. Johnson*, 510 F.Supp. 1019, 1023 (E.D. Mich. 1981) (hereinafter "*Glover II*"), *aff'd sub nom*, *Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985). Defendants were required to provide affirmative legal assistance in a broad range of areas through the provision of an adequate law library, paralegal training, and on-site legal

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[1] Federal court jurisdiction was established in this case based on 42 U.S.C. §1983 and 28 U.S.C. §1343. *Glover v. Johnson*, 478 F.Supp. 1075, 1077 (E.D. Mich. 1979). The Plaintiff class was certified in *Glover v. Johnson*, 85 F.R.D. 1, 7 (E.D. Mich. 1977).

[2] PLS is a non-profit legal services organization for indigent prisoners providing legal assistance to male prisoners in Michigan since 1975. (Sandra Girard, Tr. Vol. I, p. 62).

assistance provided by PLS. Among other areas, this legal assistance was to be provided in the area of family law/parental rights. *Glover v. Johnson*, 850 F.Supp. 592, 593 (E.D. Mich. 1994); *Glover II*, *supra* at 1023; *Glover I*, *supra* at 1097.

Throughout the 1980s, Defendants continued to deny Plaintiffs' access to the courts. In response to Plaintiffs' contempt motions, the district court found

> The failure of the department to provide prison libraries and paralegal training was part of a continuing pattern of willful and intentional violations of my orders in this case and of class members' fundamental rights of access to the courts.

Glover v. Johnson, 721 F. Supp. 808, 827 and 841 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991).

During the post-contempt remedial stage, defendants questioned their obligation to continue to fund on-site legal assistance for this Plaintiff class. (R. 727, Tr. 07/29/91, p. 18). The district court responded on August 12, 1991, with an interim order which clarified the intent of its prior orders requiring access to the courts:

> [T]his Court, after review of the pleadings and oral arguments thereon, having determined that there shall be no further delay in the implementation of this Court's previous orders
>
> . . . .
>
> IT IS FURTHER ORDERED that pending the completion of paralegal training, the development of an adequate pool of writ writers,

> and the demonstration by defendants of the plaintiff class's adequate access to the courts, defendants shall contract with Prison Legal Services forthwith to provide on-site services at all facilities and camps housing women prisoners...

(R. 681, Interim Order for Programming, pp. 1 and 3).

On January 6, 1992, Defendants entered into a contract with PLS to provide on-site legal assistance at all women's facilities so as to comply with the district court's orders on access to the courts. (R. 920, Tr. Vol. I, Pls. Exh. 6a, 6b & 6c).[3]

In a November 2, 1993, letter to the district court, Defendant Director of the MDOC stated his intent to decrease the level and scope of legal assistance for the Plaintiff class in the parental rights/child custody area in light of an access decision in the Sixth Circuit involving male prisoners.[4] He further advised PLS that it was prohibited from opening any new family law cases and required to terminate all such active cases by February 28, 1994.[5] (R. 866, Report of Defendants Regarding Legal Access).

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[3] The contract specified:

> Whereas the STATE desires to establish a system that will provide indigent female offenders currently incarcerated at the ... facility with selected legal services as ordered by the court in *Glover v. Johnson*.

R. 920, Tr. Vol I, Pls. Exh. 6a, 6b and 6c).

[4] *See Knop v. Johnson*, 977 F.2d 966 (6th Cir. 1992).

[5] Defendants did not restrict PLS' assistance to male prisoners in this area until Plaintiffs filed their motion for contempt noting the disparity of treatment. (S. Girard at Tr. Vol. I, pp. 62-63; Tr. Vol. I, Pls. Exh. 18).

On February 25, 1994, Plaintiffs filed a motion to enjoin the decrease of the level and scope of legal assistance to the Plaintiff class in light of existing court orders and Defendants' failure to seek modification. Plaintiffs also argued a separate constitutional basis for requiring continued assistance in the area of parental rights matters. (R. 887, Motion for Injunctive Relief to Compel Compliance with this Court's Orders Regarding Access to Courts and for Contempt Remedy).

Evidentiary hearings held on Plaintiffs' motion revealed the following undisputed facts regarding the impact of Defendants' termination of assistance in the parental rights area on the Plaintiff class.[6] Ninety percent of the Plaintiff class is unmarried with the majority having dependent children. *Glover*, 850 F.Supp. at 599. Moreover, "far more often than their male counterparts, women inmates have legal custody of their children and are the primary caretakers at the time of their incarceration." *Id.* During the time PLS had been providing legal assistance, parental rights has been the most sought-after area of assistance by women prisoners. (S. Girard at Tr. Vol. I, p. 62). Most of the family law assistance provided involves efforts at maintaining child custody and providing for the child's welfare until the mother's release. (S. Girard, Tr. Vol. I, p. 89.). The very fact of incarceration may lead to the termination of Plaintiffs' parental rights. *Glover*, 850 F.Supp. at 600.

After defining the factual circumstances of the Plaintiff class, testimony was presented regarding the uniqueness and complexity of parental rights law in Michigan. Three separate courts have "concurrent and overlapping

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[6] Hearings were held on Plaintiffs' motion over three days: April 4, 1994; April 6, 1994; and April 12, 1994. (R. 920, 921 and 922). Findings of Fact and Conclusions of Law were submitted at the closure of the hearings. (R. 906 and 907).

jurisdiction" over various aspects of parental rights and children's welfare in Michigan. *Id.* at 597. Each of the courts has its own procedures for access which are "impossible for an incarcerated women to do without assistance from an attorney."[7] *Id.*

In order for a incarcerated mother to even access her right to appointed counsel in termination proceedings, legal assistance is necessary.[8] *Glover*, 850 F. Supp. at 595 n. 6 and 598.

Defendants did not contest the difficulties of accessing the courts due to the uniqueness and complexity of the Michigan system and Defendants' own policies, nor the negative impact on this Plaintiff class and their children; likewise, Defendants did not challenge the district court's finding that women prisoner paralegals lack the training and experience to provide assistance in this area without attorney supervision. *Glover*, 850 F. Supp. at 594-595.

On April 29, 1994, the district court issued an Opinion and Order finding Defendants in contempt for unilaterally decreasing the scope and level of legal assistance to the Plaintiff class without filing a motion to modify its remedial contempt orders requiring the provision of this assistance. The court granted Plaintiffs' requested injunction based on the contempt finding. *Glover*, 850 F.Supp. at 593-95.

The district court further ruled with regard to assistance in the area of Plaintiffs' parental rights: (1) Defendants had placed barriers to the exercise of Plaintiffs' rights to access to the courts in this area such that it subjected Plaintiffs to

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[7] Probate courts will not accept petitions or pleadings by mail, will not writ out a women for proceedings, and will not accept collect telephone calls. (*Glover*, 850 F. Supp. at 597).

[8] The court is only required to notify a parent of the right to appointed counsel at the respondent's first court appearance. MCR 5.915(B)(1)(a).

increased risk of loss of custody and termination of their parental rights; (2) Plaintiffs' parental rights were jeopardized by the fact and condition of Plaintiffs' incarceration; (3) absent legal assistance by attorneys, Plaintiffs would be denied meaningful access to the courts to address and/or maintain their parental rights; (4) the maintenance of Plaintiffs' parental rights is a fundamental constitutional right; and (5) Defendants were required to provide affirmative assistance for Plaintiffs in the area of parental rights as it involved Plaintiffs' fundamental constitutional rights to maintain custody and control of their children. *Glover*, 850 F.Supp. at 597-601.

Defendants were required to provide this assistance until modification of the district court's orders or until Defendants could demonstrate the existence of writ writers that could provide the assistance necessary for adequate access to the courts. *Glover*, 850 F.Supp. at 595.[9]

The Sixth Circuit, in reversing the district court's decision, did not find any findings of fact to be clearly erroneous. The court ruled that no prior court orders explicitly required Defendants to fund legal assistance in the specific area of parental rights and, therefore, the district court was incorrect in finding Defendants in contempt. *Glover v. Johnson*, 75 F.3d 264, 267 (6th Cir. 1996), *reh'g denied*.

The Sixth Circuit further held that affirmative legal

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[9] Defendants' failure to comply with the district court's order resulted in Plaintiffs' Motion for Further Contempt and hearing thereon on August 16, 1994. (R. 944 and 957). Defendants based their non-compliance on confusion over the requirements of the court's order. (R. 957, Tr. 08/16/94, pp. 43-48). The district court entered an opinion and order further addressing the issue of the scope of legal assistance on August 25, 1994. (R. 947). This order was never appealed by Defendants and is not subject to this petition.

assistance need only be provided in the areas of "post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner." *Id.* at 269. The court did not address the district court's findings that Defendants had in fact created barriers to Plaintiffs' access to the courts in the areas of parental rights and custody cases, nor the district court's ruling that custody and parental rights are fundamental constitutional rights "personally involving the prisoner" or involving the prisoner's custodial situation, all bases for requiring affirmative assistance to maintain access to the courts.

REASONS FOR GRANTING THE WRIT

This case raises important constitutional issues that have yet to be addressed by this Court. While this Court has ruled on what type of legal assistance must be provided to prisoners so as to provide them with meaningful access to the courts, it has not addressed in which specific areas this assistance is required.[10] The Sixth Circuit's decision in this case, which holds that affirmative assistance is not required in the area of fundamental parental rights, despite the existence of barriers precluding meaningful access, is contrary to the reasoning of decisions of this Court and of other circuit courts.

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[10] It is Plaintiffs' understanding that this Court's recent grant of certiorari in *Casey v. Lewis*, 94-1511, which is still pending before this Court, also concerned the type of assistance required.

I. A STATE MAY NOT ERECT BARRIERS IN THE WAY OF INMATES' ACCESS TO THE COURTS.

Prisoners have a constitutional right of "meaningful access" to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977); *Ex parte Hull*, 312 U.S. 546 (1941). The state has the burden to provide meaningful access and to demonstrate that its chosen method is adequate. *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991); *Ruiz v. Estelle*, 679 F.2d 1115, 1154, fn 197 (5th Cir. 1982).

In complying with this obligation, states have both affirmative and negative obligations:

> *Bounds* made unmistakably clear ... that the right of access not only prohibits the State from interfering with incarcerated individuals' access to the courts, it means that the State must take affirmative steps "to enable prisoners to place their grievances before the judicial system."

John L., et al v. Adams, 964 F.2d 228, 233 (6th Cir. 1992) (citations omitted).

With regard to the prohibition on erecting barriers to prisoners' access, this Court in *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), noted that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Similarly, in *Johnson v. Avery*, 393 U.S. 483, 485 (1969), the Court stated that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or

obstructed." *Accord, Ex parte Hull, supra* at 549 (the state may not "abridge or impair" a prisoner's right to file for a writ of habeas corpus).

This prohibition on erecting barriers derives from the basic right of access of all persons to the courts. In holding that non-incarcerated individuals have a due process right of access to the courts in all areas, the Court in *Chambers v. Baltimore and Ohio Railroad Co.*, 207 U.S. 142, 148 (1907), held:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship ... granted and protected by the federal constitution."

Accord, Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971), holding states could not deny access to the courts to indigents who sought a divorce yet were unable to pay the docket fees.

The fact that Plaintiffs are prisoners does not diminish this right:

> [P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaint."

Cruz v. Beto, 405 U.S. 319, 321 (1971) (per curiam; citations omitted). *Accord McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

This Court has affirmed that the right of access extends to

all types of legal matters. *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (1970), *aff'd sub nom Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

Similarly, the prohibition on erecting barriers extends to all types of cases. While the Sixth Circuit limited states' obligation to provide inmates affirmative legal assistance to "cases involving constitutional rights and other civil rights actions related to their incarceration," it has acknowledged that "in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons." *John L.*, *supra* at 235; *Knop v. Johnson*, 977 F.2d 996, 1009 (6th Cir. 1992). This principle has also been expressly upheld by the Fifth,[11] Eighth,[12] and Eleventh circuits,[13] as well as by commentators and experts in the field.[14]

In the instant case, the circuit court simply ignored the district court's factual findings that Defendants had erected barriers in the way of Plaintiffs' right to access the courts in parental rights and custody cases, resulting in a denial of meaningful access to the courts.

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[11] *See Jackson v. Procunier*, 789 F.2d 307, 310-311 (5th Cir. 1986) ("Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation."); *Ruiz*, *supra* at 1153 ("Regulations and practices that unjustifiably obstruct [access to the courts] are invalid."); *Corpus v. Estelle*, 551 F.2d 68, 70 (5th Cir. 1977) ("reasonable access to the courts must include access in general civil legal matters including but not limited to divorce and small civil matters.").

[12] *Schrier v. Halford*, 60 F.3d 1309, 1313 (8th Cir. 1995).

[13] *See Straub v. Monge*, 815 F.2d 1467, 1470 (11th Cir.), *cert. denied*, 484 U.S. 946 (1987), holding that meaningful access to the courts, "although routinely presented in constitutional and civil rights actions, is likewise applicable to [a] civil forfeiture action."

[14] *See, e.g.*, American Bar Assn, Standards for Criminal Justice, Standard 23.2.1(b)(i) (1986); American Correctional Assn, Standards for Adult Correctional Institutions, Standard 3-4262, Commentary (1990).

The district court found below that

> [i]n addition to the structure of the probate, juvenile and circuit courts, the policies and practices of the Department [of Corrections] are a barrier to women inmates obtaining access to the courts for the purpose of exercising their parental rights.

Glover, 850 F.Supp. at 600.[15]

Specifically, the court found that Defendants' telephone policy, which effectively prohibits communication between prisoners (including writ-writers and paralegals) and the three sets of courts handling these cases, as well as with the respective social service and/or investigative agencies attached to these courts, forms a barrier that prohibits adequately trained writ-writers, if any existed in the women's facilities,[16] from providing effective assistance" in these areas.[17] *Id.* at 597.

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[15] Plaintiffs are not implying that Defendants are responsible for creating these restrictive court procedures; however, as these are the procedures that have been established by the State of Michigan, Defendants must take them into account and are not permitted to establish their own policies which, when combined with these procedures, deprive Plaintiffs of their right of access to the courts.

[16] The uncontradicted testimony presented before the district court was that inmate writ-writers and paralegals do not have up-to-date training or materials in the area of family law. (L. D'Aunno at Tr. Vol. II, pp. 59-60, 109, 122-123).

[17] The uncontradicted testimony in the district court established that such direct telephone contact between a parent and a court agency was required in order for the "respective court [to] determine if a hearing will be held." *Glover*, 850 F. Supp at 597. As the district court noted, given Defendants' telephone policies, it is "impossible for an incarcerated woman to do [this] without assistance from an attorney. *Id.*

There is no meaningful access to the courts in this area for women prisoners where Defendants' policies of prohibiting use of the telephone, except to make collect calls,[18] is made with full knowledge that access to the courts in the area of parental rights *requires* direct phone access in order to obtain information regarding their child's welfare, participate in mandatory pre-judicial investigative conferences with the Friends of the Court and Social Services, and obtain hearing dates.[19] (L. D'Aunno at Tr. Vol. II, p. 74; *Glover*, 850 F.Supp. at 597).

These findings of fact were unchallenged by Defendants, and the Court of Appeals did not discuss them, much less find them to be an abuse of discretion.

"The state may not bar access to the courts no matter what form it utilizes." *Straub*, *supra* at 1469. Such barriers to Plaintiffs' access to the courts are invalid. *Procunier*, *supra*. As such, Defendants are required to either remove the barriers to allow Plaintiffs access to the courts or provide some effective means for Plaintiffs to obtain such access in light of Defendants' barriers.

In addition to the barriers created by Defendants' current policies and procedures, Defendants have historically denied access to the courts by failing to provide adequate law libraries or trained paralegals. These violations, as well as other equal protection violations, all of which remain unremediated, result in additional ongoing barriers to this Plaintiff class' access to the courts. *Glover*, 721 F.Supp. 808 (E.D. Mich. 1989); *Glover*, 934 F.2d 703, 710 (6th Cir.

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[18] Defendants' policies have also resulted in the return of mail from Michigan courts when the inmate's number was not on the envelope. (G. Grieger at Tr. Vol. II, p. 148).

[19] Restrictive telephone policies alone may result in a denial of access to counsel and the court. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051-52 (3rd Cir. 1989).

1991). That a history of disparate treatment, equal protection violations, and lack of history of self-help among women prisoners may mandate legal assistance and training above the *Bounds* requirements has been recognized repeatedly by the Sixth Circuit.[20]

In light of the undisputed, uncontroverted findings of the district court in this area, the Court of Appeals erred in failing to affirm the district court or at the very minimum remand on this issue to allow Defendants the opportunity to remove the barriers, if they so choose, as opposed to providing the affirmative assistance necessary to overcome these barriers. *See*, *Ruiz*, *supra* at 1153; *John L.*, *supra* at 235.

II. PRISONERS ARE ENTITLED TO AFFIRMATIVE LEGAL ASSISTANCE TO PROTECT THEIR FUNDAMENTAL CONSTITUTIONAL RIGHTS, INCLUDING PARENTAL AND CUSTODIAL RIGHTS.

While *Bounds* clarified that the right of access to the courts requires states to provide affirmative assistance[21] to inmates in certain areas, neither *Bounds* nor subsequent decisions of this Court have addressed in which areas this

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[20] *See*, *e.g.*, *Knop v. Johnson*, 977 F.2d 996, 1004 fn. 5 (6th Cir. 1992); *John L.*, *supra* at 234 fn. 6 (6th Cir. 1992); *Glover v. Johnson*, 855 F.2d 277, 288 (6th Cir. 1988); *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991); *Canterino v. Wilson*, 644 F. Supp. 738, 740 (W.D. Ky. 1986), *aff'd*, 875 F.2d 862 (6th Cir. 1989).

[21] Such assistance may take the form of law libraries and/or assistance from persons trained in the law. *Bounds*, *supra* at 828.

assistance is required.

In reviewing the district court's ruling that parental rights constitute one of the fundamental areas requiring affirmative legal assistance, the Sixth Circuit stated:

> We are not called upon in this case to determine to what extent a parent/child relationship is a fundamental right as argued by Plaintiffs, nor do we decide whether parental rights are to be treated in a different fashion than other civil rights. The civil courts that decide legal questions in which state prisoners are interested are the proper tribunals to decide due process and legal representation questions.

Glover, 75 F.3d at 268.[22]

However, this was an area that the Sixth Circuit was required to address in reviewing the district court's ruling. The Circuit Court did hold that affirmative assistance is required in the areas of "post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner." *Id.* at 269. However, the court did not analyze Plaintiffs' claims or the district court's findings in light of this standard, which would appear to cover Plaintiffs' claims for assistance in the area of parental rights.

Moreover, Plaintiffs contend that the right of access to the courts requires affirmative assistance in areas beyond those

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[22] Although the Sixth Circuit asserted that the determination of right to counsel should be made in the state court, as opposed to the federal trial court, it ignored that the State of Michigan has already made the determination that indigents are entitled to counsel in termination hearings and that the district court found that Plaintiffs require legal assistance to access these rights.

articulated and includes other cases involving the protection of fundamental constitutional rights. Specifically, Plaintiffs contend that given the fundamental nature of parental rights, they are entitled to affirmative assistance to protect their parental and custodial rights.

It is clear that affirmative assistance must be provided so as to allow prisoners to pursue petitions for writs of habeas corpus. *Ex parte Hull*, 312 U.S. 546 (1941). *See also Johnson v. Avery*, 393 U.S. 483, 488 (1969).

Likewise, this Court has subsequently acknowledged that this right to assistance extends to civil rights actions challenging conditions of confinement. Wolff v. McDonnell, 418 U.S. 539 (1973). In so holding, the Court noted that "it is ... pertinent that both [habeas corpus and civil rights] actions serve to protect basic constitutional rights." *Id.* at 579.

Although the Court has not had occasion to specify the precise limits of where affirmative assistance is required, it has repeatedly acknowledged that "no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id. See also Procunier*, *supra* at 419 ("The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."); *Bounds*, *supra* at 827 ("[I]n this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.").[23]

Of further note is that parental rights cases, such as those

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[23] As Justice Powell stated in his concurring opinion, "The decision today recognizes that a prison inmate has a constitutional right of access to the courts to assert such procedural and substantive rights as may be available to him under state and federal law." *Bounds*, *supra* at 833.

at issue here, are defensive, aimed at maintaining Plaintiffs' parental rights. This Court has noted that the right to counsel is greater where it is needed "as a shield" to protect an individual's constitutional rights, rather than "as a sword," to attempt to challenge prior judicial determinations. *Murray v. Giarratano*, 492 U.S. 1, 7 (1989).

Parental rights are viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Wisconsin v. Yoder*, 406 U.S. 205, 232-234 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In summarizing its prior decisions on the subject, this Court held in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972):

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U.S. 77, 95, (1949) (Frankfurter, J., concurring).

As a fundamental right, the parent-child relationship "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). *See also Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

The fact that Plaintiffs are prisoners does not diminish the importance of this fundamental right. When a Plaintiff mother is incarcerated, she, of necessity, loses the ability to have day-to-day contact with her child. Despite these limitations, however, Plaintiffs maintain the essence of their fundamental parental rights while incarcerated. As the Court

noted in *Santosky*, *supra* at 753:

> The fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.

Accord In Re Clausen, 442 Mich. 648, 687 (1993).

Michigan, as well as other states, recognizes the fundamental nature of parental rights by providing representation to indigents in termination proceedings. MCL 712A.17c(4)-(6); MSA 27.3178(598.17c)(4)-(6); MCR 5.915(B).

Due process requires at a minimum that persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1970). In order for this fundamental right to have any meaning for Plaintiffs, affirmative and meaningful assistance to the courts must be provided by Defendants. *Glover*, 850 F.Supp. at 600-602.

Although this Court has yet to consider such a case, several courts of appeal have held that the right of access to the courts extends beyond habeas and civil rights actions to include civil areas involving fundamental rights, *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981), extradition proceedings, *Eldridge v. Block*, 832 F.2d 1132, 1138 (9th Cir. 1987), and civil forfeiture cases, *Straub v. Monge*, 815 F.2d 1467, 1470 (11th Cir.), *cert. denied*, 484 U.S. 946 (1987).

Other courts have gone further, noting that prisoners' right to assistance includes general civil suits. *Corpus v. Estelle*, 551 F.2d 68, 70 (5th Cir. 1977) (pre-*Bounds* ruling that inmates have right to legal assistance in "general civil legal matters including but not limited to divorce and small

civil claims"); *Smith v. Bounds*, 657 F.Supp. 1327 (E.D.N.C. 1986), *aff'd*, 813 F.2d 1299 (4th Cir. 1987), *aff'd en banc*, 841 F.2d 77 (1988) (legal assistance plan must not be limited to constitutional claims and must include "all charges brought against [the inmate] or grievances alleged by him").

In declining to find a right to affirmative assistance in the area of parental rights cases, the Sixth Circuit held below that *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), "seems to settle the issue here involved," stating that in *Lassiter* this Court "recognized no constitutional right to counsel in a parental rights case." *Glover*, 75 F.2d at 269. However, the Sixth Circuit's analysis ignored a crucial distinction between *Lassiter* and the present case: while the plaintiff in *Lassiter* was arguing for a constitutional right to court-appointed counsel in her proceeding, Plaintiffs in the instant case are asking only for *assistance* to obtain meaningful access to the courts, not representation in court.

Moreover, and contrary to the circuit court's holding, *Lassiter* did not hold that indigents were never entitled to court-appointed counsel in parental termination hearings; rather, the Court held that whether the appointment of counsel was required in any given case would depend upon an analysis by the trial court of the factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Lassiter*, *supra* at 31-32.

In the instant case, the district court went through an extensive analysis of the *Eldridge* factory, making specific findings of fact with regard to each element. *Glover*, 850 F.Supp. at 599-600.

The Sixth Circuit's summary dismissal of the district court's *Eldridge* analysis, without any discussion of the

district court's findings of fact, was erroneous.[24] The district court properly considered the *Eldridge* factors and, consistent with *Lassiter*, determined that to ensure fundamental fairness, in the circumstances set forth in the undisputed record, these Plaintiffs' due process rights under the Fourteenth Amendment entitled them to affirmative legal assistance.[25] *Glover*, 850 F. Supp. at 597.

The Sixth Circuit's decision holds that Defendants are not required to provide legal assistance in these matters, stating that since

> the ordinary law-abiding Michigander has no constitutional right of access to the public purse for legal assistance on claims involving such things as domestic relations, personal injury, deportation, workers compensation, social security, detainer, wills and estates, and taxation, it does not seem to us that such a constitutional right springs into existence by virtue of the needy person's having been convicted of a crime and sentenced to prison.

Glover, 75 F.2d at 269.

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[24] The Sixth Circuit dismissed the district court's *Eldridge* analysis, stating that "[w]e do not consider *Mathews* relevant to the issues in this case." *Glover*, 75 F.3d at 268.

[25] It must be emphasized that even though this analysis of these factors would require appointment of counsel, Plaintiffs here seek, and the district court ordered, only limited legal assistance, *not* representation. *Glover*, 850 F. Supp. at 595, 602. However, in light of the potential adverse consequences, the state's pecuniary interest in the cost of appointed counsel pales in comparison with the state's pecuniary interest in avoiding foster placement and care of these children, not to mention the psychological impact on the child and mother. (R. 887, Affd. of C. Jose-Kampfner, Pls. Ex. 10, pp. 1-2).

This statement misstates Plaintiffs' claims, as well as the district court's findings of fact and ruling, and fails to recognize relevant law as it applies to the facts of this case. First, Plaintiffs seek such assistance only in the area of parental rights, not assistance to file claims in general civil cases or in other areas of "domestic relations." Michigan does in fact recognize the right to appointed counsel in hearings that could result in termination of parental rights. MCL 712A.17c(4)-(6), MSA 27.3178(598.17c)(4)-(6). However Plaintiffs, due to their incarceration and the barriers imposed by Defendants require affirmative assistance even to access their right to appointed counsel. *Glover*, 850 F. Supp at 598 fn. 8 and 600.[26]

Second, free people do not have to make the custodial arrangements for their children required of incarcerated persons. This necessity is dictated by state statute as well as by the fact of incarceration itself. MCL 712A.19b(3)(h), MSA 27.3178(598.19b)(3)(h). Nor are free people's access to the courts restricted. They are not prohibited from appearing in court, making direct phone calls or meeting with the court's investigative and social services delegates. *Glover*, 850 F. Supp. at 601 fn. 12.[27]

Third, the Sixth Circuit's equation of the constitutional

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[26] The fact that counsel may be appointed in child custody suits is not dispositive of this issue. As with the case involving post-conviction relief, *see*, *Johnson v. Avery*, *supra* at 487, the appointment of counsel in child custody suits is only undertaken after specific steps are undertaken. Under Michigan law, counsel is only required to be appointed if a party requests it at a court hearing. MCR 5.915(B)(1)(a). Thus, where a prisoner is not able to attend a hearing due to her incarceration, she is effectively denied her state right to such counsel.

[27] Indigent civilians do have the option of obtaining assistance from federal, state, and county-funded legal services, an option that is not available to prisoners. *Glover*, 850 F.Supp. at 601. *See also* H.R. 3019, § 504(a)(15) (April 26, 1996).

rights of "ordinary law-abiding Michiganders" with prisoners' constitutional rights ignores that the very fact of incarceration creates an affirmative duty on the state to provide certain types of assistance that otherwise would not be required for free persons. Where the state takes a person into custody and holds him against his will, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989). Similarly, while the state has no constitutional obligation to provide medical care for its citizens, it is required to provide it for prisoners. *Estelle v. Gamble*, 429 U.S. 97 (1976). *See also Farmer v. Brennan*, 114 S.Ct. 1970, 1976-77 (1994).

In the area of access to the courts, prison inmates have a right to assistance, either in the form of access to a law library or assistance from someone trained in the law, to pursue their claims involving habeas corpus, civil rights, and fundamental constitutional rights despite the fact that free persons have no such right to legal assistance. *Bounds, supra*. Additionally, "[t]he state must provide [indigent prisoners] paper and pen to draft legal documents, with notarial services to authenticate them and with stamps to mail them" even though indigent civilians have no similar right to such materials. *Id.* at 824-825.[28]

Thus, the fact that "ordinary law-abiding Michiganders" have no right to legal representation in such cases, even if true, does not imply that Michigan prisoners are not entitled to legal assistance based on the fundamental nature of the right involved and the fact that their incarceration imposes certain obligations upon the state to provide for their welfare.

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[28] Provision of those materials would not provide meaningful access to these Plaintiffs where the courts will not accept handwritten petitions. (L. D'Aunno at Tr. Vol. II p. 25).

Because the Sixth Circuit did not follow the principles announced by this Court in its decisions requiring affirmative legal assistance so as to protect inmates' fundamental constitutional rights, this Court should grant Plaintiffs' petition for a writ of certiorari.

III. WHERE THE FACT OF INCARCERATION ITSELF MAY LEAD TO THE LOSS OF A FUNDAMENTAL CONSTITUTIONAL RIGHT, THE STATE IS OBLIGATED TO OFFER AFFIRMATIVE ASSISTANCE TO PRISONERS TO PROTECT THAT RIGHT.

Where, as in the instant case, an inmate's incarceration and the conditions under which she is incarcerated in and of themselves subject the inmate to the loss of a fundamental constitutional right, absent meaningful access to the courts, due process requires that assistance be provided to obtain that meaningful access.

The areas in which this Court has explicitly held that states have an obligation to provide affirmative legal assistance to prisoners -- "cases involving constitutional rights and other civil rights actions related to their incarceration"[29] -- involve instances in which the fact of incarceration itself leads to the need for such assistance.

If a person were not incarcerated or otherwise held against his or her will, he or she would have no need to file a habeas corpus petition or civil rights action regarding conditions of confinement. The very act of confinement itself gives rise to

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[29] *John L.*, *supra* at 235, *citing Johnson*, *supra*; *Wolff*, *supra*; and *Bounds*, *supra*.

obligations and liabilities that in turn require access to the courts so that prisoners' fundamental rights are not violated.

The State of Michigan, while recognizing that incarceration alone does not deprive Plaintiffs of their parental rights, links the terms of Plaintiffs' incarceration to the preservation of parental rights by providing that if during incarceration a parent fails to adequately provide for the welfare of her child, those rights may be terminated.[30] Thus, the fact of incarceration itself creates both a deprivation and a burden with regard to Plaintiffs' fundamental rights, giving rise to a need for legal assistance in this area that is not present for civilians.

This Court has not had the opportunity to address the reality faced by incarcerated women prisoners and the special needs and disadvantages they face in regard to the custody and care of their children during the pendency of incarceration. This issue is particularly important given the large increase in the population of women prisoners since this Court last addressed the issue of access to courts in 1977. While parental rights have always been recognized as fundamental, the relationship of this fundamental right to prisoners' need for affirmative legal assistance has not been considered. Thus, despite the number of women prisoners

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[30] MCL 712A.196b(3); MSA 27.3178(598.19b)(3) provides:

> The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence 1 or more of the following: .... (h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

who are custodial parents in this country with a need to provide for the adequate care and custody of their children, parental rights have not been specifically included in either of the areas -- "cases involving constitutional rights and other civil rights actions related to [a prisoner's] incarceration" -- for which courts have recognized the need for affirmative legal assistance.[31] *John L.*, *supra* at 235.

The district court specifically found that

> [a]s a result of their confinement, incarcerated women are unable to exercise their parental rights and legal responsibilities in making decisions regarding the care and placement of their children over whom they have legal custody.[32]

Glover, 850 F.Supp. at 594.

While this Court has not heretofore addressed which matters are sufficiently related to a prisoner's incarceration to warrant affirmative assistance, it has noted that issues involving fundamental rights are of special concern.[33] *Bounds*, *supra* at 824. As noted by the Court in *Wolff*, *supra*, referencing *Johnson v. Avery*, *supra*:

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[31] In 1977, when *Bounds* was decided, there were less than 10,000 female prisoners nationwide. The population has since risen to over 60,000, two-thirds of whom have at least one child for which they are the custodial parent. (R. 921, Bureau of Justice Report).

[32] The district court found that "most alternative care arrangements require some legal proceedings." *Glover*, 850 F. Supp. at 600.

[33] The right to access to courts is also deemed stronger where, as is here, the consequence is the loss of fundamental rights. *Murray*, *supra* at 7; *Cofield v. Ala. Public Service*, 936 F.2d. 512, 517 (11th Cir. 1991); *In re Green*, 669 F.2d. 779, 785 (1981).

> The right of access to the courts upon which *Avery* was premised, is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.

Wolff, *supra* at 579.

In a separate analysis, this Court in *DeShaney*, *supra* at 198, held that the Due Process Clause "in certain limited circumstances" "imposes upon the state affirmative duties of care and protection with respect to particular individuals." The court concluded:

> . . . it is the state's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the 'deprivation of liberty' triggering the protection of the Due Process Clause . . .

Id. at 199-200.

Defendants have an affirmative obligation to provide legal assistance to Plaintiffs in matters involving their parental rights because Plaintiffs' incarceration impedes them from exercising their parental rights and responsibilities. Plaintiffs' incarceration therefore subjects them to termination of their parental rights and deprives them of the ability to obtain legal assistance from traditional sources such as legal services or private attorneys.

Parental rights pose a unique issue in that Plaintiffs are required by law to arrange and maintain for the proper care and custody of their children upon incarceration or risk termination of their parental rights. MCL 712A.19b(3). The majority of Plaintiffs are the sole custodians of their children

upon incarceration and custodial arrangements are required in order to provide for these children until Plaintiffs' release. *Glover*, 850 F. Supp. at 599-600. Such custodial arrangements are impossible to accomplish from prison without assistance in accessing the courts. Absent such assistance, Plaintiffs are in danger of losing their children. Aside from habeas corpus and §1983 civil rights cases, there is simply no other area where fundamental constitutional rights are so impacted and intertwined by incarceration as with parental rights.

IV. THE SIXTH CIRCUIT ERRED IN FINDING AN ABUSE OF DISCRETION IN THE DISTRICT COURT'S FINDING OF CONTEMPT FOR DEFENDANTS DECREASING THE SCOPE AND LEVEL OF LEGAL ASSISTANCE TO THE PLAINTIFF CLASS.

In 1978, Defendants, faced with a complaint of lack of access to the courts and denial of equal protection, chose on-site legal assistance (PLS) as the mechanism to provide adequate access to the Plaintiff class of women prisoners. In 1979, the district court found such historical inadequacy of access to courts that it ordered:

> Therefore, the State is directed to begin a legal studies course -- in addition to Prison Legal Services and the existing law library -- in order to guarantee the women's right to seek a complete range of judicial relief.

Glover I at 1101.

As the district court later found:

> The 1978/1979 contract between PLS and the Department, which I ordered continued, required PLS to provide legal assistance to women prisoners in child custody disputes and/or neglect actions, as well as other matters. (Pls. Exh. 9 at 1).

Glover, 850 F.Supp. at 593.

In 1991, Defendants questioned their continued obligation to provide on-site legal assistance to the Plaintiff class. In response, the district court entered a further order requiring Defendants to contract with PLS to provide on-site services for the Plaintiff class until compliance with the remedial orders for adequate paralegal training had been demonstrated. (R. 681, Interim Order for Programming, p. 3).

Pursuant to that order, Defendants entered into a one-year contract with PLS to provide legal assistance in the same areas it had historically been required to provide, including child custody, visitation, and neglect actions. The contract specified:

> Whereas the STATE desires to establish a system that will provide indigent female offenders currently incarcerated at the ... facility with selected legal services as ordered by the court in *Glover v. Johnson*...

(R. 920, Tr. Vol I, Pls. Exh. 6a, 6b and 6c).

Implicit in both the 1979 order of the court to continue PLS and the 1991 order to contract with PLS for legal assistance was the requirement that Defendants continue the range of legal services which had been provided during the 15-year pendency of this case. Contempt requires a finding that Defendants were aware of the existence of a court order requiring him to perform or refrain from performing

particular acts. *N.L.R.B v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987).

Defendants acknowledged the existence of the court's orders and their obligation thereunder by including in their contracts with PLS language that specified that the selected legal services, including assistance in the area of parental rights, were being provided "as ordered by the court in *Glover v. Johnson*." (R. 920, Tr. Vol. I, Pls. Exh. 9). Indeed Defendants did not deny the existence of their obligation when they terminated this assistance or argued that a recent Sixth Circuit's decision on what legal assistance was required for male prisoners, *Knop*, *supra*, relieved them of their obligation in the instant case. *Glover*, *supra* at 593.

The Sixth Circuit erred in finding that Defendants' actions did not rise to the level of contempt. In basing this ruling on a finding that the court's orders did specifically require legal assistance in any particular substantive area, the Sixth Circuit ignored the 15-year history in this case and Defendants' acknowledgment of their obligations, reversing the district court on a hypertechnical reading of the court's orders. A party cannot avoid following an injunction or court order "on merely technical grounds" that the order, although obvious in its intent, was not specific in its words. *Harris v. Philadelphia*, 47 F.3d 1342, 1353 (3rd Cir. 1995). Rather, the court should look "to the 'thrust of the . . . order.'" Id.

The district court orders of 1979 and 1991 clearly intended that Defendants provide assistance in the area of parental rights. These orders constitute the law of this case, and "the law of the case doctrine applies to issues implicitly decided in earlier stages of the same case." *Griffin v. Michigan Department of Corrections*, 5 F.3d 186, 190 (6th Cir. 1993), *citing*, *Little Earth of United Tribes, Inc. v. Department of Housing and Urban Development*, 807 F.2d 1433, 1438-41 (8th Cir. 1986).

Further, as courts have consistently stated, if there is any

ambiguity in an order, its meaning is clarified by "what preceded it and what it was intended to execute." *Union Pacific Railroad Co. v. Mason City Fort Dodge Railroad Co.*, 232 U.S. 237, 247 (1911).

Defendants never sought modification or clarification of the district court's orders with regard to on-site legal assistance and simply canceled all assistance in the area of parental rights. *Glover*, 850 F.Supp. at 593.

The district court did not abuse its discretion in finding that Defendants were aware of the requirement of the court's orders and that their unilateral action in terminating assistance without seeking modification was contempt. An injunction must be obeyed until modified or reversed. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922). Failure to do so, as in this case, constituted contempt.

CONCLUSION

Because of the harm wrought by a denial of meaningful access to the courts in the area of parental rights and the conflict between the Sixth Circuit's decision in this case, other circuit courts and the principles of this Court's decisions, Petitioners hereby request that this Court grant their writ for petition of certiorari.

Respectfully submitted,

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May 28, 1996

Mary GLOVER, Lynda Gates; Jimmie Ann Brown; Manette Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

Perry JOHNSON, Director, Michigan Department of Corrections; Florence R. Crane; G. Robert Cotton; Thomas K. Eardley, Jr.; B. James George, Jr.; Duane L. Waters; The Michigan Corrections Commission; William Kime, Director, Bureau of Programs; Robert Brown, Jr., Director, Bureau of Correctional Facilities; Frank Beetham, Director, Bureau of Prison Industries; Richard Nelson, Director, Bureau of Field Services; Gloria Richardson, Superintendent, Huron Valley Women's Facility; Dorothy Costen, Director of Treatment, Huron Valley Women's Facility; Clyde Graven, Sheriff, Kalamazoo County, individually, and in their official capacities, Defendants-Appellants.

No. 94-1617.
United States Court of Appeals,
Sixth Circuit.
Argued Nov. 14, 1995.
Decided Feb. 14, 1996.

Before: WELLFORD, NELSON, and SUHRHEINRICH, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge.

Nearly twenty years ago, a group of female prisoners in the Michigan state system filed this class action claiming that they were denied access to the courts and constitutional equal

protection rights. Those plaintiffs "demanded that defendants and others, members of the Michigan Corrections Commission ('Commission'), provide them with educational and vocational opportunities comparable to those provided male inmates." *Glover v. Johnson*, 721 F.Supp. 808, 811 (E.D.Mich.1989).[1] After a bench trial, District Judge Feikens found that "the educational opportunities available to the Department's women prisoners were substantially inferior to those available to the Department's male prisoners." *Id.* Consequently, Judge Feikens entered an order setting forth a general remedial plan to provide higher education and vocational training for female prisoners.[2]

Over the course of several years, the district court has supervised the implementation of the remedial plan and has necessarily entered a panoply of orders intended to address particular issues. Specifically, in August, 1991, the court ordered the defendants to "contract with Prison Legal Services ["PLS"] forthwith to provide on-site services at all facilities and camps housing women prisoners." In accordance with that order, the defendants continued through 1993 to contract with PLS, as it had since 1979, to provide legal services to the plaintiffs in areas including "child custody disputes/neglect actions." In a letter to the district court dated November 2, 1993, however, the defendants declared that they would discontinue funding for such services because it would be improper "to continue using

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[1] The history of this case, which has consumed very considerable time and resources of the district court, the legal attention of the Michigan Attorney General's office, and extensive (and expensive) services of dedicated attorneys for the plaintiff class, is set out in *Glover v. Johnson*, 721 F.Supp. 808 (E.D.Mich.1989).

[2] See also *Glover v. Johnson*, 510 F.Supp. 1019 (E.D.Mich.1981) ("*Glover II*"), regarding additional requirements with respect to other remedies afforded female prisoners.

state funds to provide child custody assistance to offenders when law-abiding Michiganders have no right to [free] state assistance for such services."

The plaintiffs filed a motion to enjoin the defendants from discontinuing the child custody assistance, claiming that such an action would violate the court's August, 1991 order. The district court granted the plaintiffs' motion, finding the defendants in contempt and enjoining them from "unilaterally changing or modifying in any way the staffing of PLS and the areas in which PLS provides services to women inmates absent a motion to modify or to seek leave of this court." The court added that "staffing levels and areas of assistance must comply with orders and terms provided in the 1992 contract." Furthermore, the district court found that the plaintiff class was entitled under the due process clause of the Constitution to a "right to legal assistance in parental rights matters." The defendants filed this timely appeal.

The defendants first argue that the district court erred in holding them in contempt for violating a previous court order. This court reviews a finding of contempt under an abuse of discretion standard. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991); *NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987). This court has stated in a previous proceeding in this case that "[i]n a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order." *Glover*, 934 F.2d at 707. The district court below found the defendants in contempt based on a combination of the August, 1991 order, the subsequent contracts between the state and PLS, and the "custom and practice" of providing the requested service that had been followed throughout the case.

We find no order, however, mandating that the defendants pay for PLS to provide services in family law/child custody matters. The only applicable order of the district court (the

August, 1991 Order) requires the state to "contract ... to provide on-site services" at the prison facility. The plaintiff class merely argues that the court required such assistance implicitly in the prior orders of the court. On the contrary, we do not find any evidence that the court ever required that the state fund legal assistance in any particular area of the law, as the plaintiffs contend. Therefore, in the absence of any violated order of the court, we would find that the district court abused its discretion in finding the defendants in contempt.

The defendants also contend that the district court erred, as a matter of law, in finding that the Constitution requires them to provide legal assistance to plaintiffs in parental rights/child custody matters to ensure their meaningful access to the courts.[3] This court has addressed the "access to court" right, but did not limit the analysis to male or female prisoners, in *Knop v. Johnson*, 977 F.2d 996 (6th Cir.1992), *cert. denied sub nom. Knop v. McGinnis*, 507 U.S. 973, 113 S.Ct. 1415, 122 L.Ed.2d 786 (1993). This court quoted from *Bounds v. Smith* in defining the right to access:

> [T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in

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[3] In 1989, the plaintiffs first argued for the expansion of the role of legal assistance to ensure access to courts in a brief in support of enforcement of a district court order. They claimed in that brief that there was "no recourse for representation on child custody and domestic law issues," and that "[l]ack of representation in these and other legal areas" could impact adversely upon female prisoners. However, they did not contend that this representation amounted to a constitutional right, or that men prisoners receive similar legal services. This request for services was apparently based upon a contention of Prison Legal Services that assistance in "general civil matters" (a prisoner cut off from a child without a fair hearing) reduces frustration and bitterness. *See* a letter to State Representative Carolyn Kilpatrick, dated November 18, 1987.

> the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Knop, 977 F.2d at 1003 (quoting *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 1496-97, 52 L.Ed.2d 72 (1977)). We emphasized that "*Bounds* refers to law libraries *or* other forms of legal assistance, in the disjunctive, no fewer than five times." *Id.* at 1003 (quoting *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir.1985), *cert. denied*, 479 U.S. 913, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986)).

In *Knop*, this court held that Michigan was not constitutionally required to provide legal assistance to help prisoners prepare their own civil lawsuits. *Id.* at 1005. We added:

> It may well be a good idea for Michigan to provide lawyers for prisoners who want to bring lawsuits of their own. Federal judges, however, should be ever mindful of the obvious fact that not all good ideas are mandated by the Constitution. *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir.1985), *cert. denied*, 479 U.S. 913, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986). As Justice O'Connor succinctly put in her concurring opinion in *Murray v. Giarratano*, 492 U.S. 1, 13, 109 S.Ct. 2765, 2772, 106 L.Ed.2d 1 (1989), "[b]eyond the requirements of *Bounds*, the matter is one of *legislative* choice based on difficult policy considerations and the allocation of scarce legal resources." (Emphasis supplied.)
>
> In our constitutional democracy, as we understand it, *legislative* choices are to be made by legislators who are subject to removal by the people, and not by judges who enjoy office for life. See *San Antonio Ind.*

> *Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31, 93 S.Ct. 1278, 1295, 36 L.Ed.2d 16 (1973) (courts lack both authority and competence to assume a legislative role); *cf. Kelley v. Metropolitan Co. Bd. of Educ.*, 836 F.2d 986, 996 (6th Cir.1987), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2848, 101 L.Ed.2d 885 (1988). A " 'mother knows best' approach should play no part in traditional constitutional adjudication." *Murray v. Giarratano*, 492 U.S. 1, 11, 109 S.Ct. 2765, 2771, 106 L.Ed.2d 1 (1989) (Plurality opinion of Rehnquist, C.J.).

Id.

While *Knop* was concerned with prisoners who desired legal assistance and access in civil suits as plaintiffs, we believe the principles expressed apply equally to child custody, family law, and domestic cases whether the prisoner be a plaintiff or a defendant. *Knop* concluded that mandated legal assistance should be confined to habeas corpus proceedings and "civil rights actions involving constitutional claims." *Id.* at 1009 (emphasis added). Further affirmative legal assistance amounts to "an unwarranted extension of the right of access." *Id.*

At oral argument and in their brief, plaintiffs cite only *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), as supporting their claim that they are entitled to free legal representation in civil, custody, and domestic cases. *Mathews* involved claimants to social security disability benefits; it did not involve claims for free legal services. Neither was *Mathews* concerned with suits of prisoners in state custody. Further, *Mathews* pertains to "government entitlements" and to the "administrative decisionmaking process" set up to determine eligibility of an "entitlement" claimant. *Mathews*, 424 U.S. at 341, 96 S.Ct. at 905-06. We do not consider *Mathews* relevant to the

issues in this case; there is no denial here of any "entitlement" nor is there a wrongful discontinuance of a constitutional or statutory benefit. We are not called upon in this case to determine to what extent a parent-child relationship is a "fundamental right," as argued by plaintiffs, nor do we decide whether "parental rights" are to be treated in a different fashion than other civil rights. The civil courts that decide legal questions in which state prisoners are interested are the proper tribunals to decide due process and legal representation questions.

As previously noted, the district court has found that the HVWF law library meets constitutional standards. With regard to female prisoners in this facility who are not illiterate, not unable to understand English, this furnishing of a sufficient library with an adequate staff satisfies *Bounds v. Smith* standards.[4] " 'Access to the courts' ... encompasses all the means a defendant ... might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D.Cal.1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971) (per curiam). The Constitution does not require special legal help from the state in cases involving "parental rights" as asserted by plaintiffs.

We also decline plaintiffs' invitation to reach a legal conclusion that the needs of women prisoners are greater than those of male prisoners in the child custody area, and that, therefore, plaintiffs deserve more legal representation than males. That female inmates may have a greater claimed "need" for such legal assistance than male prisoners does not establish a basis for the asserted constitutional violation

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[4] Prisoners who pose serious security risks, if permitted access to the library, may also require further assistance. *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498.

argued by them. We take judicial notice of the fact that courts within this circuit, absent extraordinary circumstances, do not appoint lawyers for indigent and pro se prisoners in civil rights cases and in prisoner grievance-type cases, whether the plaintiff prisoner is a male or a female. "Prisoners have no statutory right to counsel in civil rights cases. Instead, the appointment of counsel is within the court's discretion." Charles R. Richey, *Prisoner Litigation in the United States Courts* (1995), p. 75.

Lassiter v. Department of Social Services, 452 U.S. 18, 26, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640 (1981), a case upon which the district court relied, involved parental rights and a claim of constitutional entitlement to legal services. The Supreme Court stated:

> The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.

Lassiter, 452 U.S. at 25, 101 S.Ct. at 2158. The Court emphasized that counsel is required only when the party has an interest in his or her own "personal freedom." *Id.* Indeed, the Court pointed out in *Lassiter* that counsel is not constitutionally required for a prisoner in probation revocation proceedings; "the decision whether counsel should be appointed [is] to be made on a case-by-case basis." *Id.* at 26, 101 S.Ct. at 2159. An indigent, whether or not a prisoner, is entitled to counsel only "when, if he loses, he may be deprived of his physical liberty." *Id.* at 27, 101 S.Ct. at 2159 (emphasis added). *Lassiter* seems to settle the issue here involved, and is cited by plaintiffs in their brief: "[T]he decision whether due process calls for the appointment of counsel for indigent parents in termination

proceedings [is] to be answered in the first instance by the trial court, subject, of course, to appellate review. See, *e.g.*, *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220." *Lassiter*, 452 U.S. at 32, 101 S.Ct. at 2162.

Thus, as previously noted, it is for the state court judges to decide in parental right cases, even in termination cases, whether counsel is to be appointed for an indigent party in such proceedings. In *Lassiter*, the Supreme Court recognized no constitutional right to counsel in a parental rights case.[5] Indeed, it is one step further removed for plaintiffs here to insist that the state must provide specific legal assistance to Michigan prisoners involved in parental rights and child custody cases. This might well result in favoring female prisoners over those not in state custody by reason of their criminal conduct if we were to accept plaintiffs' argument.

In reaching our decision, we are mindful that incarcerated persons face disadvantages and hardships with respect to a variety of legal concerns and with the loss of a considerable degree of freedom and liberty while in prison. They necessarily surrender some privileges while incarcerated. We recognize also that prisoners' families, and especially their children, pay a heavy price when a parent or family member is imprisoned.

We conclude that defendants are not constitutionally required to provide plaintiffs free legal assistance in parental rights matters, but that such assistance is only required in post-conviction, habeas corpus, and civil rights matters

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[5] As expressed by the dissent in *Lassiter*: "The Court today denies an indigent mother the representation of counsel in a judicial proceeding initiated by the State of North Carolina to terminate her parental rights." *Lassiter*, 452 U.S. at 35, 101 S.Ct. at 2163. At the same time, the Court in *Lassiter* recognized that a majority of state courts in 1981 did provide "appointed counsel" in parental termination proceedings as well as dependency and neglect proceedings also. *Id.* at 34, 101 S.Ct. at 2163.

involving the prisoner's custodial situation or constitutional claims personally involving the prisoner.[6] The conclusion expressed in *Knop*, which applied to male prisoners, certainly applies equally to female prisoners:

> It might be a good idea for taxpayers of Michigan to provide legal assistance for prisoners in all civil matters as to which a need can be demonstrated, just as it might be a good idea for the taxpayers to provide such assistance for the populace at large. Again, however, we return to the obvious truth that not every good idea is mandated by the Constitution. And if the ordinary law- abiding Michigander has no constitutional right of access to the public purse for legal assistance on claims involving such things as domestic relations, personal injury, deportation, workers compensation, social security, detainer, wills and estates, and taxation, it does not seem to us that such a constitutional right springs into existence by virtue of the needy person's having been convicted of a crime and sentenced to prison.

Knop, 977 F.2d at 1009.

We, accordingly, REVERSE the district court's order finding that the defendants were in contempt of court and holding that the defendants were constitutionally required to continue furnishing legal assistance to plaintiffs in family law/child custody matters.

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[6] An adequate law library or paralegal help at women's facilities is included in this limited mandate.

Mary GLOVER, et al., Plaintiffs,
v.
Perry JOHNSON, et al., Defendants.

No. 77-CV-71229.
United States District Court,
E.D. Michigan,
Southern Division.
April 29, 1994.

OPINION AND ORDER

FEIKENS, District Judge.

I. INTRODUCTION

Before me is Plaintiff Class' Motion for Injunctive Relief to Compel Compliance with this Court's Orders Regarding Access to Courts and Contempt Remedies. This motion is in response to Michigan Department of Corrections' (the "Department" or the "State") decisions to reduce funding to Prison Legal Services of Michigan ("PLS"), the agency which provides legal assistance to female inmates, and to reduce the scope of PLS services so as to exclude assistance in parental rights matters after February 28, 1994. Plaintiff class consists of all women prisoners in Michigan.

Plaintiff class argues that the decrease in PLS funding and the prohibition against assistance in the area of parental rights constitute contempt of this court's previous orders and a denial of women prisoners' meaningful access to the courts. Additionally, it raises as a new issue the constitutional right of female inmates to legal assistance and access in the area of parental rights, apart from this court's previous decision

in *Glover v. Johnson*, 478 F.Supp. 1075 (E.D.Mich.1979) ("*Glover I*") and the decision of the United States Court of Appeals for the Sixth Circuit in *Knop* and *Hadix*.[1] Defendants argue they are not in contempt because the decision in *Knop* and *Hadix* supports their conclusion that they are not required to provide access to courts for the purpose of exercising or defending parental rights. Therefore, defendants argue, the *Knop* and *Hadix* decision authorizes unilateral modification of the scope of services provided by PLS.

On April 4, 1994, I convened a hearing to determine whether defendants were in contempt of this court's previous orders and to determine whether facts existed which would justify injunctive relief. Specifically, I sought to determine whether denial of legal assistance in parental rights matters would produce irreparable harm to plaintiff class and why the harm to plaintiff class, if any, outweighed any potential harm to defendants. I also ordered the parties to submit "Proposed Findings of Facts and Conclusions of Law" with citations to the hearing record. Approximately three days of testimony was taken.[2]

This opinion addresses three issues raised in plaintiff class' motion and the corresponding hearing. The first issue addressed is plaintiff class' contention that defendants are in contempt of this court's previous orders. Second, in examining the facts in the record, I must determine whether the injunctive relief requested is justified. Finally, I address plaintiff class' argument that they have a constitutional right to legal assistance in parental rights matters.

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[1] *Knop v. Johnson*, 977 F.2d 996 (6th Cir.1992). This decision consolidated the appeal in two class actions, *Knop v. Johnson* and *Hadix v. Johnson*. The case is referred to as "*Knop* and *Hadix*" throughout this opinion.

[2] The hearings occurred on April 4, 6, and 12, 1994.

II. ORDERS IN EFFECT

A. Background

The issues before me are added to a continuum of issues which have been addressed since this case was first decided in 1979. In *Glover I*, I found, in addition to various equal protection violations, that women prisoners were not being provided with "meaningful" access to the courts, although the law library at the Huron Valley Women's Facility[3] was approaching adequacy under the standard set forth in *Bounds v. Smith*.[4] In order to protect women inmates' right to access, I ordered the State to continue the PLS effort at the Huron Valley Women's Facility, in addition to providing adequate law libraries. *Glover I* at 1097.

B. Findings of Fact

The 1978/1979 contract between PLS and the Department, which I ordered continued, required PLS to provide legal assistance to women prisoners in child custody disputes and/or neglect actions, as well as other matters. (Plaintiff Class Exh. 9 at 1.) Defendants have never sought modification of this order and have continued to fund PLS to provide assistance in the area of parental rights in 1980, 1981 and 1982 to both men inmates and the plaintiff class. (Plaintiff Class Exhs. 7, 8.) Defendants also continued funding PLS to provide assistance in the area of parental rights through 1991 without a contract. (Testimony of Sandra Girard, April 4, 1994.)

On August 12, 1991, after finding that defendants had still

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[3] This was the only prison for women at the time.

[4] 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

not remedied fully the access violations found in 1979, I entered an interim order requiring defendants to contract with PLS to provide on-site services at all facilities and camps housing women prisoners, pending: the completion of paralegal training; the development of an adequate pool of writ-writers; and the demonstration by defendants of plaintiff class' adequate access to the courts. (Interim Order of August 12, 1991.) Consistent with proceedings held on August 22, 1991, the August 12, 1991, Interim Order was to continue through November 22, 1991, the date on which defendants' remedial plan was to be submitted to the court. (September 12, 1991, Order Amending August 12, 1991 Interim Order for Programming.) At a hearing held on November 19, 1991, I determined that the Interim Order of August 12, 1991, would remain in effect indefinitely pending the report on the remedial program and the steps that would occur thereunder. (Court Transcript of November 19, 1991, p. 72.) Defendants have never sought modification of the August 12, 1991, Interim Order.

On January 6, 1992, defendants entered into a one-year contract with PLS to provide assistance in various areas including child custody, child visitation and parental neglect. (Plaintiff Class Exhs. 6a, 6b and 6c.) This contract, and the services provided thereunder, was specifically entered into for the purpose of complying with this court's previous orders. Its *Statement of Purpose* is significant:

> Whereas the STATE desires to establish a system that will provide indigent female offenders currently incarcerated at the ... Facility with selected legal services **as ordered by the court** in *Glover v. Johnson*. The purpose of this agreement is to engage the technical and professional services of the CONTRACTOR in advancement of this work, and to define the terms and conditions of this undertaking.

. . . . .

3. The areas of law in which services are to be provided are:

a. *Domestic relations including divorce, child custody, visitation disputes, and child neglect actions;*

Id. (Emphasis added.)

This is the crux of this case. For years, through PLS lawyers, inmate mothers in parental rights cases could contact the court or the agency involved and those PLS lawyers and their paralegal assistants did provide the bridge for these inmate mothers. PLS lawyers (they did not go into court) could obtain either pro bono or court-appointed lawyers for the inmate mothers, where necessary.

The 1992 contract provided for three full-time staff attorneys, one of whom specialized in the area of parental rights, (Plaintiff Class Exhs. 6a, 6b and 6c at the appendices), to provide legal services to all women inmates in Michigan in various areas including parental rights. Defendants contracted with PLS to provide assistance in the area of parental rights until 1994. (Testimony of Sandra Girard, April 4, 1994.) The 1994 contract provided that funding for services in the area of parental rights would conclude on February 28, 1994. (Plaintiff Class Exhs. 3, 4.)

C. Conclusion

Because defendants have not sought modification of my previous orders and unilaterally have eliminated this assistance, they are in contempt. The Interim Order of August 12, 1991, which supplemented my 1979 Opinion and Order, is still in effect. *Glover I*, 478 F.Supp. 1075 (1979);

Interim Order of August 12, 1991; September 12, 1991, Order Amending August 12, 1991 Interim Order for Programming; Court Transcript of November 19, 1991, p. 72.

D. Injunctive Relief

"[I]n granting or refusing interlocutory injunctions the court shall ... set forth findings of fact and conclusions of law which constitute the grounds of its action." Fed.R.Civ.P. 52(a). The facts which follow are in addition to the findings of fact at II.B., *supra*.

1. Findings of Fact

As a result of their confinement, incarcerated women are unable to exercise their parental rights and legal responsibilities in making decisions regarding the care and placement of their children over whom they have legal custody. The inability to structure alternative care arrangements during their incarceration subjects incarcerated mothers to increased risk of loss of legal custody of their children and subsequent termination of parental rights. (Testimony of Lisa D'Aunno, April 6, 1994.)

Specifically, the conditions of confinement imposed by defendants control, and limit the mothers' exercise of their parental rights and custodial responsibilities. (Testimony of Lisa D'Aunno, April 6, 1994.) Paralegals in the prison population are not adequately trained to deal with parental rights matters and telephone access to the courts is restricted, making it impossible to obtain outside counsel and maintain the outside contact necessary in parental rights matters. (Testimony of Lisa D'Aunno and Gail Grieger, April 6, 1994.) Defendants' policies constitute an additional barrier to the inmates' ability to exercise their parental rights and

responsibilities without outside assistance.

2. Conclusion

Plaintiff Class' Motion for Injunctive Relief is granted. Because members of plaintiff class and their children will suffer irreparable harm if legal assistance in parental rights matters is discontinued, and because this harm would clearly outweigh any potential harm to defendants, defendants are enjoined from unilaterally changing or modifying in any way the staffing of PLS and the areas in which PLS provides services to women inmates, absent a motion to modify or to seek leave of this court. Fed.R.Civ.P. 60(b). Staffing levels and areas of assistance must comply with orders and terms provided in the 1992 contract.

III. CONSTITUTIONAL RIGHT TO LEGAL ASSISTANCE IN PARENTAL RIGHTS MATTERS

Additionally, both parties have framed an issue as to the existence of a constitutional right of female inmates to court access and legal assistance in parental rights matters. A factual hearing was held to ascertain whether a sufficient factual basis exists on which a decision could be based.[5] Plaintiff class argues that parental rights are afforded protection under the U.S. Constitution. It argues that it is entitled to, and defendants are obligated to provide, legal assistance in parental rights matters. Defendants argue that pursuant to the decision of the United States Court of Appeals for the Sixth Circuit in *Knop* and *Hadix*, access to the courts and/or legal assistance in matters involving

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[5] *See supra* note 2 and accompanying text.

parental rights is not constitutionally mandated. Alternatively, in defense of their decision to discontinue legal assistance in parental rights matters, defendants argue that the *Knop* and *Hadix* decision supports their conclusion that the Department can determine the form of legal assistance to be provided. Therefore, defendants argue, because women's prison facilities have adequate law libraries and some paralegal assistance, there is meaningful access to courts as required by the U.S. Supreme Court in *Bounds*.

For the reasons that follow, I conclude that the *Knop* and *Hadix* decision does not address the scope or form of legal assistance provided to female inmates and is therefore not applicable in this case. In the area of parental rights, legal assistance is required because the provision of an adequate law library and some paralegal assistance, alone, is insufficient to provide meaningful access to the courts. I conclude that the maintenance of parenthood is a fundamental right which is entitled to protection under the Constitution. Incarcerated mothers have a right to, and the Department is obligated to provide, legal assistance in parental rights matters affecting their children so as to be able to be represented in court.[6]

A. *Knop* and *Hadix* Decision As Limiting the Scope and Form of Legal Access and Assistance to Women Inmates

The first issue presented for appeal in *Knop* and *Hadix*, 977 F.2d 996 (6th Cir.1992), was whether the district courts had erred in finding, as both did, that Michigan prisoners had been denied their right of access to the courts. The U.S. Court of Appeals for the Sixth Circuit supported the

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[6] PLS lawyers are vital in getting pro bono or court-appointed attorneys for the inmate mothers.

conclusions of the district courts:

> [O]n the record before us, and finding no clear error in the facts as determined by the district courts in their thorough and well-crafted opinions, we are satisfied that there are at least some Michigan prisoners who have been denied the type of access to the courts required under the current Supreme Court doctrine.

Id. at 999. The applicability of *Knop* and *Hadix* to the issues presented in this motion ends at this point. Defendants contend that pursuant to *Knop* and *Hadix*, the State has no obligation to provide legal assistance to women inmates in the area of parental rights. The error in defendants' reading of *Knop* and *Hadix* in the first instance is that those cases dealt with the rights of male prisoners. The court of appeals did not address the areas in which legal assistance would or would not be required for women prisoners. As discussed below, the court specifically recognized that access considered "meaningful" to male inmates might not constitute meaningful access for women inmates. *Id.* at 1004 n. 5. The same point applies to the areas in which legal assistance is provided to women prisoners. As relates to male prisoners, the court of appeals would restrict the types of legal matters to which affirmative assistance extends to: "[1] collateral attacks upon their convictions and [2] for challenging the conditions of their confinement." *Id.* at 1009. There is no basis to conclude that this same limitation would be placed on female prisoners, particularly, when they are faced with the loss of a fundamental right, the right to the custody of their children.

The second question answered by the court of appeals was how far the State must go to affirmatively assist prisoners in gaining meaningful access to the courts. The court concluded that "access to the courts need not entail access to

an attorney; access to an adequate law library, *or* to paralegal personnel with access to such a library would be sufficient [sic]." *Id.* at 999. (Emphasis added.) The court of appeals found that the district court in *Hadix*, particularly, had gone too far in requiring, as part of that plaintiff class' remedy that the Department provide both a constitutionally sufficient law library *and* a staff of attorneys. Defendants argue this supports their conclusion that it can choose to provide an adequate library only with some inmate paralegal assistance. Since there are adequate law libraries at the women's prison facilities and some paralegals, defendants believe legal assistance is not required.

The error, in defendants' reading the *Knop* and *Hadix* decision as limiting legal assistance in this case, is that the decision did not address access to the courts by women prisoners. In discussing what is necessary to provide meaningful access, the court specifically pointed out that in the case of women prisoners, the requirement may need to be read in the "conjunctive" rather than the "disjunctive": "Where female prisoners lack their male counterparts' history of 'self-help' in the law, however, *equal protection considerations may require that library facilities be supplemented by assistance from a lawyer.*" *Id.* at 1004 n. 5. (Emphasis added.) The court of appeals acknowledged that what constituted meaningful access to male prisoners might not be sufficient to provide "meaningful" access to female prisoners. Chief Judge Engel's concurring opinion in *Glover v. Johnson* ("*Glover II*"), 855 F.2d 277 (6th Cir.1988), made the point clearly:

> Equal protection is not the same as identical treatment, for identical treatment may indeed result in very unequal protection. Nor is exact mathematical parity of financial per capita expenditure to be similarly equated. [T]here are many and significant differences

> between the sexes and there is nothing humanity can do about them ... The task of an even-handed penological system responsible for the confinement of both sexes is to adjust realistically to such differences without temptation to use them to mask latent bias or uncorroborated assumptions.

Id. at 288. Although the appeal in *Glover II* involved facts and issues different from those presented here, Judge Engel's point addresses the caution which must be exercised when analogizing and comparing remedies, as well as rights, of men and women prisoners. Simply because the court in *Knop* and *Hadix* would not require legal assistance[7] *and* an adequate law library for male prisoners does not automatically mean that this same limitation applies to female inmates faced with a similar problem of access.

B. Meaningful Access Consistent With "*Bounds*"

It is well settled that prisoners have a fundamental right to access to courts which requires prison authorities to assist inmates in the preparation and filing of legal papers. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977). This fundamental right is generally protected by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. The issue in *Bounds* was whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of constitutional rights to the courts. *Id.* at 817, 97 S.Ct. at 1491. The issue in this case as relates to *Bounds* is what

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[7] A distinction must be kept in mind as to the difference between PLS's lawyers (legal assistants) and inmate paralegals.

type of legal assistance is adequate to give prisoners meaningful access to the courts for the purpose of exercising and/or defending challenges to their parental rights.

1. Findings of Fact

Matters pertaining to a mother's exercise of her parental and custodial rights may be raised in any of three state courts: circuit, probate or juvenile. (Testimony of Lisa D'Aunno, April 6, 1994.) These three courts have both concurrent and overlapping jurisdiction. Each of these three courts also has a different social and/or investigative agency attached to it such as Friend of the Court, Department of Social Services and Child Protective Services. Each court and its corresponding agency has special procedures, which often are not codified, that must be followed before a matter will be heard or acted upon such that gaining access to the juvenile, probate or circuit courts for the purpose of exercising parental rights is impossible for an incarcerated woman to do without assistance from an attorney. There are various informal levels of correspondence/communication which must take place between the parent and the agency before the respective court will determine if a hearing will be held. The hearing or action will usually take place upon the recommendation of the respective agency and the disposition of the issue is usually determined by the recommendation of the particular agency.

In addition to the structure of the probate, juvenile and circuit courts, the policies and practices of the Department are a barrier to women inmates obtaining access to the courts for the purpose of exercising their parental rights. In the area of family law and parental rights, telephone calls to case workers, the probate, juvenile and circuit courts, and their respective investigative agencies, care-givers, and potential caregivers, are imperative.

The Department prohibits prisoners from making direct telephone calls and neither the courts nor their respective agencies accept collect telephone calls. This policy also forms a barrier that prohibits adequately trained writ-writers, if any existed in the women's facilities, from providing effective assistance. The inability to exercise parental rights and responsibilities subjects incarcerated mothers to increased risk of the loss of custody and termination of parental rights.

2. Conclusion

Defendants argue that because adequate law libraries are in place with some inmate paralegals, there is no obligation to further assist inmate mothers. This argument misses the whole point of *Bounds*: "Meaningful Access" is the key. *Bounds*, 430 U.S. at 823, 97 S.Ct. at 1495. Meaningful access is the ability to be heard "to get your foot in the door". Although defendants argue that female inmates have access to the courts, because they have at their disposal an adequate law library and some inmate paralegals, and presumably can file various pleadings with the court, the structures of the various courts in the area of parental rights prevent meaningful access by incarcerated persons through the filing of papers alone.

The point of *Bounds* was that prison authorities must assist prisoners in gaining access to courts to protect fundamental constitutional rights. "Meaningful Access" is the touchstone. In this case there can be no meaningful access without the assistance of an attorney who is able to interface with the court and its respective agency. PLS, through its legal assistance to the inmate mothers, provides the vital method by which a pro bono or court- appointed attorney can represent the inmate mothers in court. In addition, an attorney is needed in the event that the inmate is not able to obtain a writ ordering her appearance at the

various informal proceedings.[8]

C. Constitutional Right To Legal Assistance in Parental Rights Matters

Plaintiff class argues it has a constitutional right to meaningful access to the courts to protect fundamental parental rights. (Plaintiff Class Conclusions of Law at 4.) In this instance, meaningful access can only be achieved with legal assistance. Defendants do not dispute that parenthood is a fundamental right but argue access to the courts and/or legal assistance in parental rights matters is not constitutionally mandated. (Defendants' Findings of Fact and Conclusions of Law at 6.) The Due Process Clause of the Fourteenth Amendment guarantees certain freedoms which are key to the determination of the issue raised by the parties: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Supreme Court recognized in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), that the "liberty" guaranty had not been specifically defined, but noted it definitely included parenthood: "Without doubt, it denotes not only freedom from bodily restraint but also the right of the individual to ... marry, establish a home *and bring up children*." *Id.* at 399, 43 S.Ct. at 626. (Emphasis added.) The Supreme Court has

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[8] Under Michigan law a prisoner may have the right to be present at termination proceedings only. M.C.R. 5.973(A)(3)(b); M.C.L. 712A.19(4)(b). Due process does necessarily require the presence of an incarcerated parent at a termination hearing. *In re Vasquez*, 199 Mich.App. 44, 49, 501 N.W.2d 231 (1993). If, through the exercise of diligent effort, the presence of the prisoner at the termination hearing cannot be secured, the hearing may be held in the prisoner's absence. M.C.R. 5.973(A)(3)(b); M.C.L. 712A.19(4)(b).

made it clear on more than one occasion that a parent's right to the "companionship, care, custody, and management" of his or her child's life is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). *See also Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (the rights to conceive and raise one's children are basic civil rights). Thus it is clear from Supreme Court precedents that parenthood is a fundamental right which is entitled to due process protection under the Constitution.

Defendants are correct in their assertion that the Constitution does not require automatic appointment of counsel in parental rights proceedings. The Constitution requires "due process." Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). Due process is flexible and calls for a variety of procedural protections depending upon the particular situation. *Id.* at 334, 96 S.Ct. at 902. In determining what procedure is adequate to provide due process, it is necessary to determine of what fundamental fairness consists in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 25, 101 S.Ct. 2153, 2158, 68 L.Ed.2d 640 (1981).

The general rule gleaned from Supreme Court precedents on an indigent's right to appointed counsel is that such right has been recognized to exist only where the litigant may lose his or her physical liberty if he or she loses the litigation. *Id.* Thus it is the litigant's interest in personal freedom which triggers the right to appointed counsel. *In re Gault*, 387 U.S. 1, 34, 87 S.Ct. 1428, 1447, 18 L.Ed.2d 527 (1967). As the litigant's risk of loss of personal freedom diminishes, so does the right to appointed counsel. *See e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). All other elements in the due process decision must be measured against this presumption. *Lassiter*, 452 U.S. at 27, 101 S.Ct. at 2159.

The Court in *Mathews v. Eldridge*, provided three elements (the "Eldridge factors") which must be balanced in determining what the due process right requires, when physical liberty is not threatened: (1) the private interests at stake, (2) the risk that the procedures used will lead to erroneous decisions and the value of additional or substitute procedural safeguards, if any, and (3) the government's interest, both fiscal and administrative. 424 U.S. at 335, 96 S.Ct. at 903. In the area of parental rights, the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings[9] is answered in

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[9] It has also been argued that an indigent parent may be entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. *Lassiter* at 34, 101 S.Ct. at 2163 (quoting from IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3(b) (1980); U.S. Dept. of HEW, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts at 25(b) (1969); National Council on Crime and Delinquency,

the first instance by the trial court subject to appellate review. *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 32, 101 S.Ct. 2153, 2162, 68 L.Ed.2d 640 (1981).

The Court in *Lassiter* applied the "*Eldridge* factors" in determining whether an incarcerated mother, who claimed she was indigent, had been denied due process under the Fourteenth Amendment. The petitioner's request for appointed counsel at a parental rights termination hearing had been denied. *Id.* at 22, 101 S.Ct. at 2157. A termination hearing was held and petitioner's parental rights were terminated. *Id.* at 24, 101 S.Ct. at 2158.

Applying the first Eldridge factor, the Court in *Lassiter* determined that the private interest at stake was the petitioner's risk of loss of the care, custody and companionship of her child. *Id.* at 27, 101 S.Ct. at 2159. As a result, a parent has a strong interest in the accuracy and justice of the decision to terminate his or her parental rights. *Id.* The same risks apply to plaintiff class. As of 1993 only 10% of female inmates were married; whereas 64% had dependents/children. (Plaintiff Class Exh. 31 at 4 and 5); (Exh. 9 to Plaintiffs' Motion for Injunctive Relief and to Compel Compliance). The majority of the children are minors at the time of the inmates' incarceration. *Id.* In addition, far more often than their male counterparts, women inmates have legal custody of their children and are the

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Standard Juvenile Court Act at 19 (1959)). Several courts have specifically held that indigent parents may also have a right to appointed counsel in proceedings other than termination of parental rights. *E.g.*, *Davis v. Page*, 640 F.2d 599 (5th Cir.1981) (en banc); *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir.1974); *Smith v. Edmiston*, 431 F.Supp. 941 (W.D.Tenn.).

primary caretakers at the time of their incarceration.[10] (Testimony of Lisa D'Aunno, April 6, 1994; *1994 Bureau of Justice Report on Women in Prison*.) Because of differences in the roles of male and female inmates in the lives of their children, placement of children issues are more significant for incarcerated mothers than incarcerated fathers. (*Unheard Voices: A Report on Women in Michigan County Jails*; Plaintiff Class Exh. 11 to Motion For Injunctive Relief at 64.) The conditions of confinement prevent plaintiff class from making decisions regarding the placement and alternative care of their children during their period of incarceration. Most alternative care arrangements require some legal proceeding or transfer of custodial authority. (Testimony of Lisa D'Aunno, April 6, 1994.) This, added to the fact that most prisoners are indigent at the time of arrest and cannot afford to hire private counsel, subjects incarcerated mothers to increased risks of loss of custody of their children and the eventual termination of their parental rights due to their inability to exercise parental rights and responsibilities. *Id.* Termination of parental rights results in an absolute denial of any future relationship between a mother and child.

The Court in *Lassiter* also concluded that the state shared the parents' interests in accurate and just decisions and, thus, might also share indigent parents' interests in the availability of appointed counsel. *Lassiter* at 28, 101 S.Ct. at 2160.

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[10] The Governor of this State has recognized this reality: "*Unheard Voices: A Report on Women in Michigan County Jails* recognizes that most female offenders are incarcerated for non-violent, often economically motivated crimes. Most are the primary caretakers of their children.... [T]hey must also return to their homes and communities with the ability to provide for themselves and their children." (Letter from Governor John Engler to a Concerned Citizen (7/19/93), Exhibit 11 to Plaintiff Class' Motion to Compel Injunctive Relief).

The state's interests diverge, however, from those of incarcerated parents after this point. The state is interested in making the termination decision as economically as possible and avoiding the expense of lengthened proceedings. *Id.* The presence of appointed counsel may lengthen and complicate the proceedings. This directly conflicts with the state's interest to spend as little money as possible. *Id.* Defendants and plaintiff class, in this case, have conflicting interests also. Termination and other proceedings involving parental rights have, as their primary purpose, the improvement of the quality of life of the affected children. On the other hand, as expressed specifically in this case, defendants refuse to expend funds for Prison Legal Services legal assistants who can obtain appointed counsel for inmate mothers at termination hearings. Defendants do not dispute that counsel would only increase the probability that decisions about the quality of life of the involved children will be the correct ones, but simply do not wish to foot the bill.

As to the final Eldridge factor, the Court in *Lassiter* concluded that the complexity of termination proceedings coupled with the incapacity of an uncounseled parent, in some instances, may make the risk of an erroneous decision high. *Id.* at 30, 101 S.Ct. at 2161. The same conclusion applies to plaintiff class. The confusion as to the procedures of the three courts which handle parental rights matters alone may lead to erroneous decisions. (Testimony of Lisa D'Aunno, April 6, 1994.) The lack of phone calls to a case worker, in some instances, establishes grounds for termination of parental rights. *Id.* In addition, the inability to be heard or have written papers reviewed by the respective court without first having some sort of relationship with the court's respective agency also increases the risk that a termination proceeding, if and when held, will result in an unfavorable outcome for the uncounseled parent.

The Court in *Lassiter* concluded that the petitioner's due process right had not been denied by the trial court's failure to appoint counsel at her parental rights termination proceeding. *Id.* at 32, 101 S.Ct. at 2162. The Court found that the absence of counsel, on behalf of petitioner, did not render the proceeding fundamentally unfair. *Id.* The Court based its decision primarily on the trial court's finding that the petitioner had expressly declined to appear at a previous custody hearing. *Id.* at 33, 101 S.Ct. at 2163. The Court remarked that in deciding what due process requires, it "need not ignore a parent's plain demonstration that she is not interested in attending a hearing." *Id.*

Applying the reasoning of *Lassiter* to the facts presented in this case, I reach a different result. I conclude, in applying the three Eldridge factors, that access to the court is required to guarantee plaintiff class due process in matters concerning and/or affecting their parental rights. The structure of the various courts as well as the regulations of the Department constitute a barrier to the plaintiff class' exercise of a fundamental right. Plaintiff class members, up until the point PLS services in the area of parental rights were discontinued, actively and effectively exercised their parental rights with the assistance of PLS. (Testimony of Lisa D'Aunno and Gail Grieger, April 6, 1994.) Fundamental fairness requires that legal assistance in the area of parental rights be provided to assure plaintiff class has adequate due process by having that legal assistance serve pro bono or as court-appointed attorneys, when necessary.

The Department advances two arguments in defense of its conclusion: (1) it is not obligated to affirmatively assist women prisoners in the exercise of this fundamental right and (2) parents in the free world do not have the right to legal assistance in the areas requested by plaintiff class. The U.S. Court of Appeals for the Third Circuit, in *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir.1987),

addressed defendants' points, by analogy. *Monmouth* involved the state's obligation to assist women prisoners in exercising the fundamental right of abortion. Relating to defendants' first point, the court recognized that a woman has a fundamental right to choose abortion under *Roe v. Wade*[11] and found that various county policies regarding procedures to receive an abortion limited this right. The court found that the state had an affirmative obligation to assist women prisoners in exercising this fundamental right. *Id.* at 337. The court also recognized that while the Constitution does not require prison officials to adopt the best method of accommodation, the opportunity they provide inmates to exercise the asserted right must be meaningful. *Id.* (quoting *Patterson v. Mintzes*, 717 F.2d 284, 288 (6th Cir.1983)). The court concluded that inmates retain their constitutional right to choose abortion and this right must be accommodated by prison officials if no legitimate, penological objective is thereby compromised. *Id.* at 344.

Generally, the Supreme Court has held that a prisoner retains those constitutional rights that are not inconsistent with his or her status as a prisoner or with the legitimate penological objectives of the corrections system. *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). The right to remain a parent throughout a period of incarceration, therefore, is not forfeited. Just as the plaintiffs in *Monmouth* retained their fundamental right to abortion, plaintiff class members, in this case, retain the fundamental right to seek to retain legal custody of a child (or children) during their period of incarceration. Defendants are obligated to assist plaintiff class in exercising the responsibilities and rights inherent in this status.

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[11] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

As to defendants' second point that people in the free world are not entitled to legal assistance in parental rights matters,[12] the court in *Monmouth* concluded that the government's obligations to the free world were different from its obligations in the prison context. *Monmouth* at 341. For instance, in the prison context, the government is required to provide various items to facilitate the exercise of religion. This would be a violation of the Establishment Clause in the free world. *Id.* Similarly, the government must provide prisoners in its care with minimum standards of food and housing when no similar obligation exists to the many homeless people in this country. *Id.* Last, the government must provide prisoners with medical treatment when there are many people in this country who have no healthcare. "Because of the very fact of incarceration, the Supreme Court has recognized that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself or herself." *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)). The Court also concluded that the county's obligation to accommodate the rights of its prisoners attached notwithstanding their indigency or wealth. *Id.* at 344. Plaintiff class members are unable to effectively exercise their parental rights by reason of their incarceration. They cannot make the appropriate

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[12] Defendants' point is also not true. The Michigan State Bar Foundation distributed IOLTA grants to 15 legal services provider organizations in 1992. (Michigan State Bar Foundation "Overview," Plaintiff Class Supplemental Exhibit 1.) These grants are used exclusively to provide services to low income or indigent people. (Affidavit of Robert F. Gillett, Exhibit 5 to Plaintiff Class' Motion for Injunctive Relief.) Thirty-nine percent of the legal services provided by way of these grants was in the area of family matters including child custody, parental rights, and guardianships. (Michigan State Bar Foundation "Overview," Plaintiff Class Supplemental Exhibit 1.)

contact with various state agencies, nor can they effectively be heard on custody matters before the respective courts without personal contact through PLS with those courts. The affirmative assistance of defendants is required.

An order providing injunctive relief may be submitted. Such order shall likewise provide that unless immediate compliance, as is requested in this opinion, is made, a hearing on contempt penalties may immediately be sought.

IT IS SO ORDERED.

No. 94-1617

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY GLOVER, ET AL., Plaintiffs-Appellees,	)	Filed Mar 27, 1996
v.	)	ORDER
PERRY JOHNSON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. Defendants-Appellants.	)	

BEFORE: WELLFORD, NELSON, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green /s/
Leonard Green, Clerk pe

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

MCL 712A.17c(4)-(6), MSA 27.3178(598.17c)(4)-(6) provides, in relevant part:

(4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the respondent's first court appearance of all of the following:

(a) The right to an attorney at each stage of the proceeding.

(b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.

(c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.

(5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.

(6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. A respondent who is a minor may not waive his or her right to an attorney if the respondent's parent or guardian ad litem objects.

MCL 712A.19b(3), MSA 27.3178(598.19b)(3) provides, in relevant part:

(3) The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following

* * *

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation

> that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.
>
> * * *
>
> (4) If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent shall not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

MCR 5.915(B) provides, in relevant part:

> (B) Child Protective Proceedings.
>
> (1) Respondent.
>
> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,
>
> (ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any

later hearing.

(b) When it appears to the court, following an examination of the record, through written financial statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.

(c) The respondent may waive the right to an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent or guardian ad litem objects to the waiver.

(2)

Supreme Court, U.S.
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No. 95-1935
In the Supreme Court of the United States
October Term, 1995

MARY GLOVER, et al,

Petitioners,

v.

KENNETH McGINNIS, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHERE THERE HAS BEEN NO SHOWING OF ANY INDIVIDUAL OR WIDESPREAD ACTUAL INJURY TO THE INMATES' ABILITY TO ATTACK THEIR SENTENCES OR CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT, IS THE MICHIGAN DEPARTMENT OF CORRECTIONS REQUIRED BY THE CONSTITUTION TO PROVIDE LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS?

II.

CAN RESPONDENTS BE HELD IN CONTEMPT BY THE DISTRICT COURT FOR NOT PROVIDING LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS WHERE NO PREVIOUS COURT ORDER REQUIRED SUCH ASSISTANCE AND WHERE CONTROLLING COURT OF APPEALS PRECEDENT WITHIN THE CIRCUIT HELD THAT SUCH ASSISTANCE IS NOT CONSTITUTIONALLY REQUIRED?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

PARTIES.....1

JURISDICTION.....1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS DOES NOT REQUIRE THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN FAMILY LAW MATTERS.....6

II. RESPONDENTS CANNOT BE HELD IN CONTEMPT FOR NOT PROVIDING LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS WHERE NO PREVIOUS COURT ORDER REQUIRED SUCH ASSISTANCE AND CONTROLLING COURT OF APPEALS PRECEDENT WITHIN THE CIRCUIT HELD THAT SUCH ASSISTANCE IS NOT CONSTITUTIONALLY REQUIRED.....10

CONCLUSION.....12

RELIEF SOUGHT.....12

TABLE OF AUTHORITIES

Cases Page(s)

Bounds v. Smith, 430 U.S. 817,
52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977)..... 3,7

Glover v. Johnson, 478 F. Supp. 1075
(E.D. Mich. 1979)..... 2

Glover v. Johnson, 510 F. Supp. 1019
(E.D. Mich. 1981)..... 3

Glover v. Johnson, 850 F. Supp. 592 (E.D. Mich. 1994).....4

Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996).....5

In re Vasquez, 199 Mich. App. 44;
501 N.W.2d 231 (1993).....9

Knop v. Johnson and Hadix v. Johnson,
977 F.2d 996 (6th Cir. 1992)
cert. den. 507 U.S. 973 (1993).....3

Lewis v. Casey, 518 US ___,
135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)..... 6,9,10

N.L.R.B. v. Cincinnati Bronze, Inc.,
829 F.2d 585 (6th Cir. 1987).....11

Statutes

28 U.S.C. §1254(1)..... 1

Mich. Comp. Laws 712A.17c(4)..... 9

Mich. Comp. Laws 712A.17c(5)..... 9

Michigan Court Rules

M.C.R. 5.915(B)(1).....9

M.C.R. 5.923(D).....9

PARTIES

Respondents do not dispute the designation of parties.

JURISDICTION

Respondents do not dispute this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1977, a civil rights lawsuit was filed in the United States District Court for the Eastern District of Michigan on behalf of all female inmates (Petitioners) incarcerated by Respondents, officials of the Michigan Department of Corrections (MDOC). Subsequently, in 1979 the district court issued an opinion and order finding that educational programs offered women inmates were not equivalent to those offered to male inmates and this lack of parity denied female inmates equal protection. The district court also found that the legal assistance provided by the MDOC to female inmates to insure the free exercise of their right of access to the courts was constitutionally inadequate. Furthermore, to insure that female inmates had access to the courts, the district court ordered MDOC to provide paralegal training to female inmates, to maintain the existing law library and to continue contracting with Prison Legal Services of Michigan, Inc. (PLS). Glover v. Johnson, 478 F. Supp. 1075, 1101 (E.D. Mich. 1979).

PLS is a non-profit independent organization which provides legal services to prisoners. During the mid-1970's, the Young Lawyers Association of the State Bar of Michigan initiated a pilot project to provide legal assistance to male prisoners. Funding was provided by the Young Lawyers Association and the American Bar Association. Funding through MDOC began in 1978 and at the same time, the correctional facility housing female inmates was also included in the contract for legal services. Subsequent to the 1979 order, but independent of it, the primary funding for PLS has been provided by the State of Michigan. PLS and MDOC entered into three contracts between October of 1979 and September of 1982 to provide both male and female prisoners with legal assistance in criminal, civil, and probate matters, including divorce, child custody and neglect actions. (R. 920, 04/04/94 TR. at pp. 55-60.)

After the culmination of extensive negotiations, the district court entered a final order in 1981. The 1981 final order required MDOC to provide paralegal training to interested and qualified inmates, until such time as there

existed a pool of adequately trained female inmate assistants. The purpose of paralegal training was to assure female inmates access to the courts. In the 1981 final order, the district court explained that the objective of the paralegal training program was to provide a pool of adequately trained female inmates who could provide legal assistance to fellow inmates. Glover v. Johnson, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981).

On October 15, 1992, the Court of Appeals decided two consolidated class action lawsuits filed by male inmates in Michigan, both involving access to courts. In Knop v. Johnson and Hadix v. Johnson, 977 F.2d 996 (6th Cir. 1992) cert. den. 507 U.S. 973 (1993), the Court of Appeals held that pursuant to Bounds v. Smith, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), the district court abused its discretion when it ordered MDOC to provide both a constitutionally sufficient law library and a staff of attorneys. "The Director of the Michigan Department of Corrections has not engaged in the sort of contumacious conduct attributed to the North Carolina authorities in the Bounds litigation. Absent such conduct, we see no justification for the federal courts to require the authorities in Michigan to use taxpayer dollars to hire attorneys-at-law for the preparation of prisoner lawsuits." Knop, supra, at 1005. The Court of Appeals also ruled that MDOC was only obligated to provide affirmative legal assistance for prisoners for purposes of pursuing collateral attacks on their convictions and challenging the constitutionality of conditions of their confinement. "As to other types of civil actions, although states may not erect barriers that impede access of incarcerated persons, we held that a requirement of affirmative assistance would be an unwarranted extension of the right of access." Id. at 1008-1009.

Based upon the Court of Appeals' decision in Knop v. Johnson and Hadix v. Johnson, supra, MDOC advised PLS that legal assistance to both male and female inmates in the area of family law must completely end. As a consequence of MDOC informing PLS to end family law legal assistance for inmates, Petitioners filed a "Motion For Injunctive Relief To Compel Compliance With The District Court Orders Regarding Access To Courts And For Contempt Remedies"

on February 25, 1994. (R. 887, Motion.) Respondents filed their response opposing Petitioners' motion on March 29, 1994. (R. 900, Response.) Hearings were held in the district court on April 4, 6, and 12, 1994.

Although during these hearings MDOC repeatedly requested that Petitioners and the district court identify what order(s), if any, were the subject of contempt proceedings, the only order that was discussed was an August 12, 1991 interim order of the district court. (R. 681, Interim Order.) A review of the August 12, 1991 interim order reveals that the only statement concerning PLS is as follows: "IT IS FURTHER ORDERED that pending completion of paralegal training, the development of an adequate pool of writ writers and the demonstration by defendants of the plaintiff class's adequate access to the courts, defendants shall contract with Prison Legal Services forthwith to provide on-site services at all facilities and camps housing women prisoners." Id. at 3. There is absolutely nothing in the August 12, 1991 interim order that requires MDOC to provide affirmative legal assistance to male or female inmates in family law matters. At the conclusion of the proofs, the district court asked for proposed findings of fact and conclusions of law to be made only on the issue involving the injunctive relief. (R. 921, 04/06/94 TR. at pp. 197-198.)

In its April 29, 1994 opinion, the district court determined that MDOC was in contempt of the court's August 12, 1991 interim order. Glover v. Johnson, 850 F. Supp. 592 (E.D. Mich. 1994). (Pet. App. at 11-33.) "Because defendants have not sought modification of my previous orders and unilaterally have eliminated this assistance, they are in contempt. The Interim Order of August 12, 1991, which supplemented my 1979 Opinion and Order, is still in effect." Id. at 594. (Pet. App. at 15.) The district court also ruled that because "maintenance of parenthood is a fundamental constitutional right," MDOC was required to provide affirmative legal assistance to female inmates, but not male inmates, in family law matters. Id. at 595. (Pet. App. at 18.) Although the district court acknowledged that in proceedings for termination of parental rights the law of the State of Michigan already

provided that indigent parents are entitled to counsel, the district court ordered MDOC to provide affirmative legal assistance through PLS. As support for its decision, the district court determined that MDOC's policy of prohibiting prisoners from making direct telephone calls to state courts and agencies, and the fact that these state courts and agencies do not accept collect calls, constituted a barrier to female inmates obtaining access to the courts for purposes of exercising their parental rights. Id. at 597, 600. (Pet. App. at 22.)

As a consequence of the district court's summary finding of contempt without proper foundation, Respondents objected to the proposed order entered on May 6, 1994. Respondents stated in their objections that the proposed order was ambiguous with regard to the exact orders actually subject to contempt, and Respondents also objected that they were instructed only to submit proposed findings of fact and conclusions of law on the injunctive relief requested by Petitioners. (R. 913, Objections.) The district court's May 6, 1994 order enjoined MDOC from failing to provide legal assistance to Petitioners at the staffing levels and in the areas of assistance, including family law matters, which had previously been included in the 1992 contract between MDOC and PLS. The May 6, 1994 order also found MDOC in contempt of the district court's prior orders. (R. 912, Order.) It is from these district court decisions that MDOC appealed to the Court of Appeals.

On February 14, 1996, the Court of Appeals issued an opinion which held that MDOC was not constitutionally required to continue providing legal assistance to Petitioners in family law or child custody matters. Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996). (Pet. App. at 9):

> Thus, as previously noted, it is for the state judges to decide in parental rights cases, even in termination cases, whether counsel is to be appointed for an indigent party in such proceedings. . . .
>
> We conclude that defendants are not constitutionally required to provide plaintiffs free

> legal assistance in parental rights matters, but that such assistance is only required in post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner.

The Court of Appeals also determined that there was no district court order requiring MDOC to fund legal assistance in any particular area of law, and that the district court abused its discretion when it found MDOC in contempt. Id. at 267. (Pet. App. at 3-4.) On March 27, 1996, Petitioners' request for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals. (Pet. App. at 34.)

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS DOES NOT REQUIRE THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN FAMILY LAW MATTERS.

This Court has already disposed of the issue presented in the petition for writ of certiorari. In Lewis v. Casey, 518 US ___, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996), this Court was confronted with a class action on behalf of "all adult prisoners" of the Arizona Department of Corrections (ADOC). 135 L. Ed. 2d at 615. In their class action lawsuit, the prisoners alleged that they were deprived of their right of access to the courts in violation of the First, Sixth and Fourteenth Amendments. After a three-month bench trial, the district court determined that there were systemic constitutional violations with numerous issues including ADOC's training of library staff, updating of legal materials and availability of photocopying services. The district court also determined that lockdown prisoners were routinely denied access to the law library and that illiterate or non-English speaking inmates did not receive adequate legal

assistance. After eight months of investigation by a court appointed special master, the district court adopted a twenty-five page injunctive order which mandated sweeping changes with regard to ADOC's prison law libraries and legal assistance programs. Subsequently, the Court of Appeals affirmed the decision of the district court.

This Court reversed the decision of the Court of Appeals. "We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic Bounds violation invalid." 135 L. Ed. 2d at 616 (emphasis added). As support for its decision, this Court noted that Bounds v. Smith, 430 U.S. 817 (1977), did not establish that prisoners have a right to a law library or to legal assistance, but rather, prisoners have a right of access to the courts. "In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." 135 L. Ed. 2d at 617-618.

In addition, this Court clarified that the requirement of showing actual injury is not satisfied by any type of frustrated legal claim, but rather, must involve either: 1) direct appeals from convictions, 2) habeas corpus petitions, or 3) civil rights actions to vindicate fundamental constitutional rights:

> To demand the conferral of such sophisticated legal capacities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires. . . .
>
> In other words, Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it

> requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any <u>other</u> litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

135 L. Ed. 2d 619-620 (Emphasis in original).

Petitioners seek an extremely broad determination of a right to legal assistance in family law matters and their argument hinges on the most severe type of matter, parental rights termination proceedings. Although Petitioners concede that, as a matter of Michigan law, all indigent parents are already entitled to counsel in parental rights termination proceedings, they nevertheless ask this Court to declare that female inmates, but not male inmates, are entitled as a matter of constitutional law to legal assistance in parental rights termination proceedings and other types of family law matters. Petitioners incorrectly contend that MDOC imposes "barriers" to female inmates so they need affirmative legal assistance in order to access their right to court-appointed counsel, but the only "barrier" that Petitioners identify in their petition is that MDOC does not permit inmates to make direct telephone calls and that many state courts and agencies do not accept collect telephone calls. It should be noted that the policy of courts and agencies in the State of Michigan against accepting collect telephone calls is not unique, since Respondents are informed and believe that federal courts also do not accept collect telephone calls from prisoners. In any event, Petitioners failed to produce any evidence that they could not effectively communicate with courts, court personnel or their court-appointed attorneys by use of other methods such as the mail.

Respondents submit that MDOC's telephone policy does not create an unconstitutional impairment of the ability to access the courts. At most it is merely an impairment of a litigating capacity which is "simply one of the incidental (and perfectly constitutional) consequences of conviction

and incarceration." Lewis v Casey, 135 L. Ed. 2d at 620. Since the Petitioners are seeking far more than a right of access to the courts to challenge their convictions or the conditions of their confinement, their claims are not constitutionally protected.

Petitioners have misstated Michigan law regarding the procedures involved in parental rights terminations proceedings. For example, they state that if an incarcerated mother is unable to attend a hearing, she is denied her right to court-appointed counsel (Pet. 21, fn. 26), but they offer no support for this statement, and it is simply incorrect. The mere fact that the right to appointed counsel is triggered by the initiation of court proceedings does not mean that a person is deprived of counsel if she happens not to be present at that time. Michigan statutes and court rules, already provide elaborate safeguards to protect the rights of parents.

Pursuant to statute, all parents, whether incarcerated or not, are informed that they have the right to an attorney at each stage of the parental rights termination proceeding, and if they are indigent, they have the right to a court-appointed attorney. Mich. Comp. Laws 712A.17c(4). Indeed, without respect to the parent's presence in court, Mich. Comp. Laws 712A.17c(5) specifically provides that, "If it appears to the court . . . that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent." Michigan Court Rules also require that the court inform the incarcerated mother of her right to a court-appointed attorney. M.C.R. 5.915(B)(1). In addition, pursuant to court rule, the court may make use of closed circuit television, speaker telephone or other electronic equipment in order to protect the rights of an incarcerated mother. M.C.R. 5.923(D). "In light of present-day telecommunications, other means that fall short of securing the physical presence of a parent are available to ensure that an incarcerated prisoner receives due process at a dispositional hearing." In re Vasquez, 199 Mich. App. 44, 48-49; 501 N.W.2d 231 (1993).

During the hearing before the district court, Petitioners produced one inmate witness who provided testimony concerning her legal problems establishing a guardianship for her daughter. (R. 921, 04-06-94 TR at pp. 118-126.) Petitioners also produced one attorney witness that testified generally concerning the problems faced by other incarcerated mothers trying to establish guardianships for the care of their children. However, Petitioners failed to produce any evidence of "actual injury" to any individual Petitioner's right of access to the courts to challenge their convictions or the conditions of their confinement, much less that there is "widespread actual injury." Lewis v. Casey, supra, 135 L. Ed, 2d at 616.

Defendants submit that pursuant to Lewis v. Casey, this Court should deny the petition for writ of certiorari. The Court of Appeals ruling in this case is entirely consistent with this Court's decision in Lewis v. Casey. "We conclude that defendants are not constitutionally required to provide plaintiffs free legal assistance in parental rights matters, but that such assistance is only required in post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner." (Pet. App. at 9-10.) Therefore, given that Petitioners have failed to show that the Court of Appeals has decided this case in a way that conflicts with relevant decisions of this Court, the petition for writ of certiorari should be denied.

II.

RESPONDENTS CANNOT BE HELD IN CONTEMPT FOR NOT PROVIDING LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS WHERE NO PREVIOUS COURT ORDER REQUIRED SUCH ASSISTANCE AND CONTROLLING COURT OF APPEALS PRECEDENT WITHIN THE CIRCUIT HELD THAT SUCH ASSISTANCE IS NOT CONSTITUTIONALLY REQUIRED.

Petitioners also argue that the Court of Appeals erred when it determined that the district court's finding of con-

tempt was an abuse of discretion. However, a review of the district court's August 12, 1991 interim order reveals that the court never addressed state funding for legal assistance in any particular area of law. Thus, the Court of Appeals was indisputably correct when it ruled that MDOC had not violated an order of the district court and thus, it could not be held in contempt. N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 590-591 (6th Cir. 1987): "The standard requires the petitioner in a civil contempt case to prove by clear and convincing evidence that the respondent violated the court's prior order. . . . A litigant may be held in contempt if his adversary shows by clear and convincing evidence that he violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." Therefore, given that the Court of Appeals correctly determined that the district court abused its discretion when it held Respondents in contempt, the petition for writ of certiorari should be denied.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the constitutional right of access to the courts applies only to challenges to convictions and to conditions of confinement and does not require the Respondents to provide legal assistance exclusively to female inmates in parental rights matters. The Sixth Circuit Court of Appeals also correctly determined that the finding of contempt by the district court was an abuse of discretion.

RELIEF SOUGHT

Wherefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August, 1996

APPENDIX

Table of Contents

Page

Mich. Comp. Laws 712A.17c.....1b

Mich. Comp. Laws 712A.19b.....3b

Michigan Court Rule 5.915.....7b

Michigan Court rule 5.923.....9b

MICHIGAN COMPILED LAWS

MCL 712A.17c; MSA 27.3178(598.17c) Proceedings brought under § 712A.1; right to attorney; appointment, waiver, notice, assessment of costs, discharge

Sec. 17c. (1) In a proceeding under section 2(a) or (d) of this chapter, the court shall advise the child that the child has a right to an attorney at each stage of the proceeding.

(2) In a proceeding under section 2(a) or (d) of this chapter, the court shall appoint an attorney to represent the child if 1 or more of the following apply:

(a) The child's parent refuses or fails to appear and participate in the proceedings.

(b) The child's parent is the complainant or victim.

(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.

(d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

(e) The court determines that the best interests of the child or the public require appointment.

(3) Except as otherwise provided in this subsection, in a proceeding under section 2(a) or (d) of this chapter, the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child's parent or guardian ad litem objects or if the appointment is made pursuant to subsection (2)(e).

(4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the

respondent's first court appearance of all of the following:

(a) The right to an attorney at each stage of the proceeding.

(b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.

(c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.

(5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.

(6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. A respondent who is a minor may not waive his or her right to an attorney if the respondent's parent or guardian ad litem objects.

(7) In a proceeding under section 2(b) or (c) of this chapter, the court shall appoint an attorney to represent the child. The child shall not waive the assistance of an attorney. The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each subsequent proceeding or hearing, review the agency case file and consult with the foster parents and the caseworker.

(8) If an attorney is appointed for a party under this section, the court may enter an order assessing attorney costs against the party or the person responsible for the support of that party. An order assessing attorney costs may be enforced through contempt proceedings.

(9) An attorney appointed by the court under this section shall serve until discharged by the court.

MCL 712A.19b; MSA 27.3178(598.19b) Termination of parental rights; notice, findings; orders

Sec. 19b. (1) Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or the children's ombudsman pursuant to Section 7 of the children's ombudsman act, the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated.

(2) Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following:

(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.

(b) The foster parent or custodian of the child.

(c) The child's parents.

(d) If the child has a guardian, the guardian for the child.

(e) If the child has a guardian ad litem, the guardian ad litem for the child.

(f) If tribal affiliation has been determined, the

elected leader of the Indian tribe.

(g) The attorney for the child and the attorneys for all parties.

(h) If the child is 11 years of age or older, the child.

(i) The prosecutor.

(3) The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(a) The child has been deserted under either of the following circumstances:

(*i*) If the parent of a child is unidentifiable and has deserted the child for 28 or more days and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.

(*ii*) The parent of a child has deserted the child for 91 or more days and has not sought custody of the child during that period.

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:

(*i*) A parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(*ii*) A parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(c) The parent was a respondent in a proceeding

brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will rectified within a reasonable time considering the age of the child.

(*ii*) Other conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

(d) The parent of a child has placed the child in a limited guardianship under section 424a of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.424a of the Michigan Compiled Laws, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 424a of Act No. 642 of the Public Acts of 1978 regarding the child to the extent that such noncompliance has resulted in a disruption of the parent child relationship.

(e) The parent of a child who has a guardian under the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.1 to 700.993 of the Michigan Compiled Laws, has substantially failed, without good cause, to comply with a court-structured plan described in section 424b or 424c of Act No. 642 of the Public Acts of 1978, being sections 700.424b and 700.424c of the Michigan Compiled Laws, regarding the child to the extent that such noncompliance has resulted in a disruption of the parent-child relationship.

(f) The child has a guardian under the revised probate code, Act No. 642 of the Public Acts of 1978, *** and both of the following have occurred:

(*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(4) If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing.

(5) If the court finds that there are grounds for

termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent shall not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

(6) As used in this section, "concerned person" means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the department of social services, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

MICHIGAN COURT RULES

MCR 5.915
ASSISTANCE OF ATTORNEY

(A) **Delinquency Proceedings.**

(1) *Advice*. If the juvenile is not represented by an attorney, the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition.

(2) *Appointment of an Attorney*. The court shall appoint an attorney to represent the juvenile in a delinquency proceeding if:

(a) the parent refuses or fails to appear and participate in the proceedings,

(b) the parent is the complainant or victim,

(c) the juvenile and those responsible for the support of the juvenile are found financially unable to retain an attorney and the juvenile does not waive an attorney,

(d) those responsible for the support of the juvenile refuse or neglect to retain an attorney for the juvenile and the juvenile does not waive an attorney, or

(e) the court determines that the best interests of the juvenile or the public require appointment.

(3) *Waiver of Attorney.* The juvenile may waive the assistance of an attorney except where a parent or guardian ad litem objects or when the appointment is based on subrule (A)(2)(e). The waiver by a juvenile must be made in open court to the judge or referee, who shall find and place on the record that the waiver was voluntarily and understandingly made.

(B) **Child Protective Proceedings.**

(1) *Respondent.*

(a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,

(ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.

(b) When it appears to the curt, following an examination of the record, through written financial statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.

(c) The respondent may waive the right to an attorney, except that the court shall not accept the waiver by a respondent who is minor when a parent or guardian ad

litem objects to the waiver.

(2) *Child.* The court must appoint an attorney to represent the child at every hearing. The child may not waive the assistance of an attorney. The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each proceeding or hearing subsequent to a preliminary hearing or emergency removal hearing, review the agency case file and consult with the foster parents and the caseworker.

(C) **Appearance.** The appearance of an attorney is governed by MCR 2.117(B).

(D) **Costs.** When an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party, which order may be enforced through contempt proceedings.

(E) **Discharge.** An attorney appointed by the court to represent a party shall serve until discharged by the court.

MCR 5.923
MISCELLANEOUS HEARING PROCEDURES

(A) **Additional Evidence.** If at any time the court believes that the evidence has not been fully developed, it may

(1) examine a witness,

(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence.

(B) **Examination or Evaluation**. The court may order that a minor or parent be examined or evaluated by a physician, dentist, psychologist, or psychiatrist.

(C) **Fingerprinting and Photographing**. The court may permit fingerprinting or photographing or both of a minor when the minor is in court custody. Fingerprints and photographs must be placed in the confidential files, capable of being located and destroyed on court order.

(D) **Electronic Equipment; Support Person**. The court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, support persons, and take other measures to protect the child witness as authorized by, and enumerated in, 1987 PA 45, MCL 712A.17b; MSA 27.3178(598.17b).

(E) **Impartial Questioner**. The court may appoint an impartial psychologist or psychiatrist to ask questions of a child witness at a hearing.

(3)

No. 93-1935

Supreme Court, U.S.
FILED
JUL 19 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF

If plaintiffs had their way, this case would have been decided on different grounds below. To argue that this case is not the best vehicle for the questions presented, plaintiffs seek to confine the Third Circuit's decision to asserted facts that are either contrary to the record or immaterial. Their efforts serve only to highlight that this case presents the questions for which review is sought in their starkest form: The challenged construction and application of ERISA § 402(b)(3) overrides an expressly reserved right to amend, strikes a term from the plan documents, and restores employee welfare benefits that the plan sponsor had the acknowledged right to terminate.

Plaintiffs argue, for example, that the disputed amendment was incorporated only in a summary plan description and not

in a "governing document" of the plan. (Opp. Br. 2, 4). But the Court of Appeals accepted the District Court's finding to the contrary. The District Court specifically found that the 1983 revised plan description, incorporating the challenged amendment, was the plan document controlling the terms of the plan:

> The Court must . . . look to the 1983 booklet without [the invalidated] amendment as the governing document [of the plan].

(A.38).

There is no need to resolve the further issues plaintiffs try to inject. Plaintiffs make much ado about the testimony of the Curtiss-Wright executives who had drafted the amendment, distinguishing between a "clarification" of existing plan terms (because those terms already reserved Curtiss-Wright's right to terminate the plan for any reason at any time) and an "amendment" substantively changing those terms. (J.A. 1142, 1236-39). But this semantic conundrum is immaterial here. The District Court recognized that the revised language added to the plan, whether called an amendment or a clarification, was intended to be a plan term; the only difference was whether it substantively changed the plan. (App. 36-37). The revised language was incorporated in the "governing document" setting forth the plan terms,[1] (A.38); the District Court held that it was an amendment, (A.36); and the Third Circuit premised its decision on the revision's status as an amendment. (App. 6-7). No theoretical distinction between amendment and clarification affects the Third Circuit's analysis or the breadth of its holding.

To invalidate the amendment here, the Court of Appeals relied exclusively on its conclusion that the plan failed to

---

[1] While plaintiffs refer to this as "casual redrafting," the amendment was drafted and inserted into the plan by the same company executives who had established the plan constitution in 1976 and who were responsible for administering the plan. (J.A. 1141-42, 1204, 1235-36).

comply with § 402(b)(3), (App. 10-11), essentially acknowledging that the amendment met all other prerequisites of a valid amendment. (App. 9, n.4). Indeed, in other cases, the Third Circuit repeatedly had declined to decide the validity of plan amendments based on the absence of amendment procedures because it was not necessary to do so. (App. 9-10). Here, by contrast, it concluded that "this case requires that we now reach that issue." (*Id.*)

This case thus presents the questions for which review is sought without complication. Under the decision below, an amendment is invalid whether or not there is an express right to amend the plan, whether or not the amendment is incorporated in the plan documents distributed to participants, and whether or not the affected benefits are vested. This broad impact threatens countless plans and the sponsors, administrators, and other fiduciaries associated with those plans, and warrants this Court's review.

Respectfully submitted,

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